Office-Supreme Court, U.S.
FILED
FEB 9 1983
ALEXANDER L. STEVAS, CLERK

Nos. 82-185, 82-246, 82-259

In the Supreme Court of the United States

OCTOBER TERM, 1982

BOSTON FIREFIGHTERS UNION, LOCAL 718,
PETITIONER,
v.
BOSTON CHAPTER, NAACP, INC., ET AL.,
RESPONDENTS.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
PETITIONER,
v.
PEDRO CASTRO, ET AL.,
RESPONDENTS.

NANCY B. BEECHER, ET AL.,
PETITIONERS,
v.
BOSTON CHAPTER, NAACP, INC., ET AL.,
RESPONDENTS.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Question Presented

Having previously found discriminatory exclusion of racial minorities from a city's police and fire departments, and having previously established a program of relief designed to remedy the effects of that discrimination, did the district court properly exercise its discretion when, in order to prevent the substantial eradication of the court's remedial efforts, it prohibited the reduction of current proportionate representation of minority officers when the city undertook a massive and unforeseen program of seniority-based layoffs?

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Brief for Respondents

Statement Of The Case

These are civil rights cases. They arose out of state civil service practices which were found to have historically excluded

blacks and hispanics from the Police and Fire Departments of the City of Boston. Remedial measures designed to eliminate the effects of this exclusion were ordered and had been in operation for several years when, in 1981, the City implemented a massive reduction in force program. Upon motions to modify prior remedial orders, the district court prohibited reduction of current minority proportional representation and enjoined implementation of the program insofar as it would operate strictly in accordance with the Massachusetts civil service seniority statute. Asserting the absolute priority of seniority expectations, petitioners challenge the district court's power to prevent the frustration and substantial eradication of the ongoing remedial process.

The judgment under review was entered in two consolidated actions which have lengthy histories. One case relates to the Boston Police Department, the other to the City's Fire Department.[1]

A. *Prior Proceedings*

1. The Police Case

The police action was commenced in 1970 by unsuccessful black and hispanic candidates for appointment as Boston police officers. Plaintiffs claimed racial discrimination, in violation of the Fourteenth Amendment and 42 U.S.C. §§ 1981 and

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[1] The opinion of the court of appeals is reported at 679 F.2d 965 (1st Cir. 1982), and the opinion of the district court is reported at 522 F.Supp. 873 (D.Mass. 1981). The police case, entitled below *Castro* v. *Beecher*, was previously reported at 334 F.Supp. 930 (D.Mass. 1971); 459 F.2d 725 (1st Cir. 1972); 365 F.Supp. 655 (D.Mass. 1973); and 386 F.Supp. 1281 (D.Mass. 1975). The fire case, entitled below *Boston Chapter, NAACP, Inc.* v. *Beecher*, was previously reported at 371 F.Supp. 507 (D.Mass. 1974); 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); and 423 F.Supp. 696 (D.Mass. 1976). Certain of the unreported decisions, decrees and stipulations are reproduced in the Joint Appendix ("Jt. App."). The appendix to the Boston Firefighters Union Petition for Certiorari is referred to as "Pet. App."; the appendix to the Boston Police Patrolmen's Union Petition for Certiorari is referred to as "Pol. App."

1983, in connection with recruitment and certification practices established by the Massachusetts Civil Service Commission and implemented, through appointment procedures, by the Boston Police Department as well as other appointing authorities subject to Massachusetts civil service regulations. *Castro* v. *Beecher*, 334 F.Supp. 930, 934 (D.Mass. 1971). In 1970, only 65 of 2,805 Boston police officers were black or hispanic, representing but 2.3 percent of the total complement of sworn officers; the minority population of Boston, however, exceeded 16 percent at the time. *Castro* v. *Beecher*, 459 F.2d 725, 730 (1st Cir. 1972).[2]

Following trial, the district court found that the Massachusetts civil service police entrance examination discriminated against minorities, including plaintiffs, who did not share "the prevailing white culture." 334 F.Supp. at 935-36, 943. On appeal the Court of Appeals for the First Circuit held that the civil service examinations were racially discriminatory. *Castro* v. *Beecher*, *supra*, 459 F.2d at 730-33. The court of appeals remanded the case with instructions that the district court enter a remedial order which "will yield a significant increment of black and Spanish-surnamed police officers in the near term" and insisted that the relief fashioned by the district court "is to be more than token." *Id.* at 737.

Following remand the district court approved a consent decree which provided various remedial measures, including the establishment of civil service certification priority pools consisting of black and hispanic applicants and the implementation of affirmative recruitment programs aimed at blacks and hispanics. *Castro* v. *Beecher*, 365 F.Supp. 655, 660-62 (D.Mass. 1973).

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[2] Although the district court originally referred to the percentage representation of blacks on the police force in 1970 as 3.6 percent, *Castro* v. *Beecher*, *supra*, 334 F.Supp. at 935, the court subsequently corrected the figure to "hardly 2%," *id.*, 365 F.Supp. at 665. The court of appeals figure of 2.3 percent was derived from computation based upon specific personnel statistics in the record.

In 1975 plaintiffs brought another action, pursuant to the All Writs Act, 28 U.S.C. § 1651, to clarify and preserve the effect of the district court's decree in light of litigation which had taken place in the Massachusetts courts relating to the appointment of police officers in accordance with statutory preferences. The district court held that the priority pools established by the decree superseded the statutory scheme of preferences, but that the statutory preferences remained in effect within the several pools. *Castro* v. *Beecher*, 386 F.Supp. 1281, 1285 (D.Mass. 1975). The district court requested that the parties agree upon a substitute consent decree and recommended the comprehensive remedy adopted in the meantime in the fire case, *Boston Chapter, NAACP, Inc.* v. *Beecher*, 371 F.Supp. 507 (D.Mass. 1974), *aff'd*, 504 F.2d 1017 (1st Cir. 1974). *Castro* v. *Beecher*, *supra*, 386 F.Supp. at 1286.

Thereafter the parties entered into a further consent decree, which was approved by the district court on July 7, 1975. (Jt. App. 52-63.) The decree required various race-conscious measures, including certification of police applicants by methods designed to facilitate the appointment in the cities of Boston and Springfield of one minority police officer for each white police officer and the appointment by other appointing authorities on a ratio of one to three. The decree provided that its remedial measures shall apply to any city or town which has a minority population of one percent or more until the police force of the municipality "achieves a complement of minorities commensurate with the percentage of minorities within the community." (Jt. App. 63.)

On July 13, 1976 and on June 1, 1979, the district court entered supplemental decrees. These decrees required various continuing remedial measures. They also discharged from the court's jurisdiction the police departments of eighty-one cities and towns which had attained the proportional representation remedial target according to current census statistics. (Jt. App. 64-69, 70-77.)

2. The Fire Case

The fire case was commenced in 1972 by the NAACP and unsuccessful black and hispanic applicants for appointment as Boston firefighters. As in the police case, plaintiffs claimed racial discrimination, in violation of the Fourteenth Amendment and 42 U.S.C. §§ 1981 and 1983, in connection with recruitment and certification practices established by the Massachusetts Civil Service Commission and implemented, through appointment procedures, by the Boston Fire Department as well as other appointing authorities. In 1973 the Attorney General brought an action raising similar claims, together with claims under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and the two actions were consolidated. *Boston Chapter, NAACP, Inc.* v. *Beecher*, *supra*, 371 F.Supp. at 509-10. At the time of trial, in 1974, only 18 of 1,983 Boston firefighters were black or hispanic, representing a mere 0.9 percent of the total. *Id.* at 514. Yet the minority population of the city was by then approximately 23 percent. *Id.* at 514.

Following trial, the district court found that plaintiffs had been victims of racial discrimination through the administration of a type of civil service examination which had been in use for at least twenty years. *Id.* at 511, 514, 517. The district court then ordered a program of affirmative recruitment of minority firefighters, enjoined further use of the civil service examination, ordered development of a job-related examination and required establishment of priority certification groups for black and hispanic applicants. *Id.* at 520-23. The district court ordered that the remedial measures remain in force for any city or town with a minority population greater than one percent until the fire department of the municipality "achieves a complement of minorities commensurate with the percentage of minorities within the community." *Id.* at 523.

Appeal followed. Relying substantially on its earlier opinion in the police case, *Castro* v. *Beecher*, *supra*, 459 F.2d 725,

the court of appeals affirmed. *Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F.2d 1017 (1st Cir. 1974). This Court denied certiorari. 421 U.S. 910 (1975).

Subsequent to the 1974 decree, the district court entered several further consent decrees and stipulations to effectuate its original order. These orders set procedures for administration of new examinations, establishment of eligibility lists, affirmative recruitment, appointments and notice and reporting. (Jt. App. 9-18, 19-22, 32-34, 35, 36-41.)

B. *Prior Remedial Measures*

Following adjudication of liability, the lower courts in both cases confronted public safety departments which starkly reflected the past discrimination. The exclusion of blacks and hispanics was evident, and the original remedial measures addressed this condition. In the fire case, for example, the district court characterized its decree as designed to eliminate the "present effects of past discrimination." *Boston Chapter, NAACP, Inc.* v. *Beecher*, *supra*, 371 F.Supp. at 520. On review the court of appeals noted that in the prior police case it had required the district court to institute suggested remedial measures "as a means of ameliorating the continuing effects of past discrimination . . . ." *Boston Chapter, NAACP, Inc.* v. *Beecher*, *supra*, 504 F.2d at 1026. The court of appeals found, similarly, that the remedial measures in the fire case went "no further than to eliminate the lingering effects" of discrimination. *Id.* at 1027.

In keeping with its focus on the present effects of past discrimination, the original remedial orders provided principally for two affirmative measures: priority certification of minority applicants and minority recruitment. The remedial scheme did not seek to provide compensation on an individual basis. No attempt was made to slot individual applicants into positions which they would have occupied absent personal victimization by discrimination, and no effort was undertaken to give

notice to, identify or give relief to individuals who had been discouraged from applying by virtue of the state's long-standing practices. The approach taken was informed by the view that the remedy adopted would "yield a significant increment" of minority officers "in the near term." *Castro* v. *Beecher*, *supra*, 459 F.2d at 737. Relief was prospective and corrective, not retrospective and compensatory.

The original relief was restrained, and it was designed to achieve its objective over time. The remedial orders contemplated their own extinction, upon achievement of the remedial target, and many local appointing authorities have since been relieved of the court's continuing jurisdiction. (See docket sheets, *passim*.) To the extent possible, the lower courts have allowed and encouraged the parties to agree upon remedial measures, notwithstanding the district court's early experience with a "dilatory and otherwise obdurate" Civil Service Commission, *Castro* v. *Beecher*, *supra*, 365 F.Supp. at 657, and the state officials' failure for several years to adopt firefighter recruiting measures ordered by the court (See Jt. App. 36-41; Boston Chapter, NAACP, Inc. Motion for Further Relief, Docket No. 72-3060-F, D.Mass., August 7, 1979; Motion of United States, Docket No. 72-3060-F, D.Mass., October 17, 1979). Certification and hiring of eligible applicants following each succeeding civil service examination has been the subject of negotiation among the parties. Consequently, the district court has never intervened to approve or disapprove the examinations administered following the original decree; indeed, but for the negotiation and entry of interim consent decrees which have governed the administration of those examinations and use of their results, those examinations would have continued to exclude blacks and hispanics from both the Police and Fire Departments. (*E.g.*, Jt. App. 19, 64.)

Between 1974 and 1980 the Boston Police and Fire Departments made progress toward correcting the effects of past discrimination. During this period the Police Department hired

492 officers, of whom 213 (or 43 percent) were black or hispanic. (Jt. App. 79.) As a result, on July 6, 1981, 224 of a total 1,912 officers were black or hispanic, and minority representation had risen to 11.7 percent. (*Id.*) During the same period the fire department hired 553 sworn personnel, of whom 248 (or 45 percent) were black or hispanic. (Jt. App. 43.) By July 7, 1981, 248 of a total 1,690 firefighters were black or hispanic, and minority representation in that department had risen to 14.7 percent. (*Id.*) However, by 1981 the black and hispanic population of the city had risen to between 29 and 30 percent, and minority representation in both departments remained far below the remedial target. Indeed it remained well below the level of minority representation in the City's population at the time of the original decrees. (*Id.*) By mid-1981 the remedial process was still ongoing and far from completed.

C. *The 1981 Layoffs*

In early 1981 the City of Boston announced that it faced unanticipated budgetary constraints. The City, as a result of recent state court decisions, owed commercial property owners in excess of $50 million due to its long-standing practice of assessing real estate in a manner that violated the Massachusetts Constitution;[3] the City faced property tax limitations recently imposed on it by an initiative referendum locally known as "Proposition 2 ½";[4] and the City's School Department unlawfully continued to spend funds vastly in excess of its budget.[5] (See July 30, 1981 transcript pp. 3-24; *The Boston Globe*, July 9, 1981, p. 19.)

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[3] July 30, 1981 transcript pp. 12-13, 15; see *Tregor* v. *Board of Assessors of Boston*, 377 Mass. 602, 391 N.E.2d 1225 (1979).

[4] July 30, 1981 transcript pp. 11-12; see 1980 Mass. Acts c. 580.

[5] July 30, 1981 transcript p. 13; see *Board of Education* v. *Boston*, 386 Mass. 103, 434 N.E.2d 1224 (1982).

In March 1981, the City chose to institute a massive reduction in force program in its Police and Fire Departments prior to the June 30, 1981 end of the 1981 fiscal year. The City announced plans to lay off personnel in accordance with the Massachusetts civil service statute, which requires layoffs in reverse order of seniority. Mass. Gen. Laws c. 31, § 39. As a result, City officials projected that by July 1, 1981 the level of black and hispanic personnel would be reduced to approximately 3 percent in the Police Department. (*Castro* v. *Beecher*, Docket No. 70-1220-C, April 22, 1981 Supplemental Stipulation, par. 6-8.) Similarly, the City planned to reduce the level of minority personnel in the Fire Department to approximately 1.5 percent. (*Boston Chapter, NAACP, Inc.* v. *Beecher*, Docket No. 72-3060-McN, April 21, 1981 Stipulation, par. 20-22.)

In early April 1981, shortly after initial termination notices were issued, plaintiffs filed motions to modify the district court's prior remedial orders, seeking relief substantially identical to that later granted. (Jt. App. 42, 78.) The district court heard argument in the fire case and scheduled argument in the police case. Promptly thereafter negotiations among city and state officials led to passage of special legislation providing for payment of an overdue cash reimbursement by the Commonwealth of Massachusetts to the City. 1981 Mass. Acts c. 121. (See *The Boston Globe*, May 6, 1981, p. 1, col. 4; May 7, 1981, p. 1, col. 3; *Castro* v. *Beecher*, Docket No. 70-1220-C, Affidavit of Chester J. Broderick, President, Boston Police Patrolmen's Ass'n, May 1, 1981.) The City thereupon rescinded the reduction in force program through the end of fiscal 1981, and the district court continued plaintiffs' motions.

Responsible efforts to deal with the City's financial affairs, however, were short-lived. By early July 1981, at the outset of the City's 1982 fiscal year, the Mayor, the City Council and elected state officials had failed to reach a compromise. The Mayor then ordered implementation of an interim City budget, which made a "worst case" series of financial assumptions and once again called for massive layoffs in the Police and Fire De-

partments. City officials announced the intention to implement layoffs in six weekly waves, running from early July to mid-August, and the layoffs commenced at the end of the first week in July. (July 30, 1981 transcript pp. 3-24.)

Administration of the layoff program in accordance with Massachusetts civil service law once again threatened a devastating reduction in the number of black and hispanic officers on both forces. The Police Department intended to lay off 252 officers, of whom 122 were black or hispanic. Of the officers to be laid off, 48 percent were minority. Strikingly, 54.5 percent of the department's entire complement of minority officers was to be dismissed. (Jt. App. 80-81.) The Fire Department intended to lay off 207 officers, of whom 113 were black or hispanic. Of the firefighters to be terminated, 54.6 percent were minority officers, and the layoff program threatened to eliminate 45.6 percent of all minority members of the force. (Jt. App. 43-45.)

Had the program been implemented, minority representation in both the Police and Fire Departments would have plummeted in six weeks. By mid-August only 103 of 1,660 police officers would have been black or hispanic, and minority representation in the department would have fallen from 11.7 percent to 6.2 percent. (Jt. App. 81.) By mid-August only 135 of 1,483 firefighters would have been black or hispanic, and minority representation in that department would have dropped from 14.7 percent to 9.1 percent. (Jt. App. 45.) In six weeks approximately half of the officers in each department hired pursuant to the district court's orders would have been terminated. Moreover, there was no certainty that additional terminations would not occur, as had been planned the preceding spring. (July 30, 1981 transcript pp. 15, 23-24.) Under these circumstances, it was apparent that the City had elected to deal with its fiscal difficulties in a manner which would preclude new hiring for an indefinite period of time and would freeze, if not further reduce, minority representation at a fraction of the level achieved during the continuing remedial phase of this litigation.

D. *The Decisions Below*

1. The District Court Decision

On July 30, 1981 the district court held a consolidated hearing on plaintiffs' motions in the two cases.[6] Modification of relief was opposed by union intervenors and state civil service officials; it was not opposed, however, by the City of Boston or its Police and Fire Commissioners.

In its August 7, 1981 opinion, the district court found that "the massive firings claimed by municipal authorities to be the result of the voters enacting Proposition 2½ amount to 'new and unforeseen conditions'." *Castro* v. *Beecher*, 522 F.Supp. 873, 877 (D.Mass. 1981) (Pet. App. A 37). The court concluded that denial of the relief sought would reverse the results of the court's prior remedies, would "allow the substantial eradication of all progress" made by blacks and hispanics in securing positions as police officers and firefighters and would produce a "grievous wrong." *Id.* at 877 (Pet. App. A 37).

The district court enjoined the Police and Fire Commissioners from reducing, pursuant to the City's reduction in force program, the percentage of minority officers obtaining at the commencement of the program; the court did not, however, order the termination or replacement of any personnel. *Id.* at 877-79 (Pet. App. A 28-29; Pol. App. 2a-3a). The court's orders had limited impact on the Massachusetts civil service statute. The court permitted unrestrained operation of the statute until it would produce a reduction in minority representation. Thereafter the court's orders required layoffs according to separate minority and non-minority personnel lists in order to maintain current minority representation. Statutory priorities and preferences, relating to both termination and rehiring, remained operable within each list.

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[6] The cases were consolidated for hearing before the chief judge of the district court due to illness of the district judge to whom the fire case had been assigned. At the hearing, written stipulations were handed up to the court and oral stipulations were entered into. Argument followed.

2. The Court Of Appeals Decision

In affirming the district court, the court of appeals first concluded that the district court had the power to modify its prior remedial orders. The court of appeals observed that these cases involve "shaping ongoing relief so as to eliminate the *condition* precipitating the original decrees" — namely, "gross discriminatory underrepresentation" of racial minorities in the police and fire departments. *Boston Chapter, NAACP, Inc.* v. *Beecher*, 679 F.2d 965, 972 (1st Cir. 1982) (Pet. App. A 13-14) (emphasis in original). In light of the City's reduction in force program, "there was ample showing that changed circumstances would totally vitiate the intended effect of the original decrees unless the proposed modifications were made. . . . Failure to take the action here challenged would result in undoing most all that had been accomplished by the original decrees." *Id.* at 972 (Pet. App. A 14-15).

Second, the court of appeals found nothing in the decisions of the Court reviewing challenges to the lawfulness of bona fide seniority systems that "precludes a court from ordering relief to remedy discrimination that exists apart from the adoption or application of a bona fide seniority system." *Id.* at 974 (Pet. App. A 19). The court of appeals observed that the Court has never addressed the "basic issue" presented here — namely, "the power of a court in a litigated discrimination case to ensure that relief already ordered not be eviscerated by seniority-based layoffs." *Id.* at 974-75 (Pet. App. A 19). The court concluded that "[t]o hold a seniority system inviolate in such circumstances would make a mockery of the equitable relief already granted." *Id.* at 975 (Pet. App. A 19).

Finally, the court of appeals held that maintenance of the percentage representation of minorities in the police and fire departments "without regard to whether the individuals comprising the minority percentage were the actual victims of past discrimination," *id.* at 975 (Pet. App. A 20-21), did not entail unconstitutional reverse discrimination. The court noted that

it is "firmly established that remedial relief for the effects of past discrimination need not be color-blind and that the use of minority-conscious percentage goals and quotas to overcome the present and ongoing effects of past discrimination is constitutionally permissible." *Id.* at 976 (Pet. App. A 22). The "fact of past discrimination," the court reasoned, constitutes a "compelling need" for a race-conscious remedy. *Id.* at 977 (Pet. App. A 23). Weighing carefully the interests of white officers, the court of appeals concluded that the district court's order did not "unnecessarily trammel" those interests, that it served the public interest and that it was reasonable. *Id.* at 977-78 (Pet. App. A 23-26).

E. *The Political Resolution*

In the spring of 1981, promptly after plaintiffs first filed their motions, special legislation had averted Boston's proposed Police and Fire Department layoffs prior to the end of fiscal 1981. (See *supra*, p. 9.) Shortly afterward, however, negotiations among state and local officials were abandoned. These negotiations resumed one day after the district court's August 7, 1981 decision. (See, *e.g.*, *The Boston Globe*, August 10, 1981, p. 1, col. 3.) Eventually, within one month of the court of appeals decision affirming the district court's orders, a solution was found. Political dealings led to omnibus legislation, 1982 Mass. Acts c. 190, which served up a *pot pourri* of bargains and benefits — including state-guaranteed City bonding authorization to raise funds to pay court-ordered tax refunds, payment to the City of state hotel excise tax revenues generated by Boston hotels and creation of a Massachusetts Convention Center Authority, which was empowered to purchase parking and convention facilities from the City and to explore the feasibility of a new indoor sports arena to be constructed in the City.

The 1982 statute also legislated a resolution of Boston's Police and Fire Department layoffs. The act provides that the Police

and Fire Departments shall reinstate any uniformed officer who was in service, on leave or temporarily suspended as of July 1, 1981, at the outset of the layoff program. 1982 Mass. Acts c. 190, § 25.[7] The act further provides that for the 1982 and 1983 fiscal years the City shall maintain in each department no fewer uniformed employees than were in service on March 24, 1982 plus the number of officers reinstated pursuant to the act. *Id.* The statute also specially modified the operation of the Massachusetts civil service statute by providing that the City shall not terminate or otherwise separate any reinstated officer "in the future for lack of funds." *Id.* The statute thus effected a fundamental modification of seniority rights of Boston police officers and firefighters; indeed it accorded reinstated personnel a kind of superseniority, granting unique job security which is both permanent and paramount to all other statutory priorities and preferences.

Following enactment of the legislation, the Police and Fire Departments reinstated, or offered to reinstate, all personnel terminated during the City's 1981 reduction in force program. (Petition for Writ of Certiorari of Boston Firefighters Union, Local 718 p. 8.) Moreover, in spite of its once asserted crisis, the City has resumed hiring new recruits in each department. (See, *e.g.*, *The Boston Globe*, November 5, 1982, p. 17.)

Summary Of Argument

These cases are moot. Subsequent to the decision of the court of appeals, the Massachusetts legislature enacted a statute which mandated the recall of all police officers and firefighters whose layoffs were affected by the district court's orders. The statute also accorded those officers unqualified job security against layoff for lack of funds in the future. The controversy between the parties is no longer live, and the Court

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[7] A copy of Section 25 is reproduced in Appendix A to this brief.

cannot provide any relief not already accorded by the statute. The district court's orders have no permanent effect, and there is no likelihood that the controversy will recur or that any decision in connection with future proceedings will evade review.

Reaching the merits of the case, the decision below should be affirmed. These are cases of adjudicated race discrimination, which had historically excluded racial minorities from Boston's Police and Fire Departments. The remedial process established by the lower courts was designed to eradicate the effects of the exclusion. This objective was mandated by both the Fourteenth Amendment and the statutes enforcing it. Although the remedial process was incomplete, the City's reduction in force program threatened to lay off, in accordance with the seniority provisions of the Massachusetts civil service statute, approximately one-half of all minority officers hired pursuant to prior decrees. The district court had the power to modify its prior decrees to prohibit this result and to enjoin the planned reduction in current minority representation. Such modification was necessary to prevent the frustration of the ongoing remedial process.

The district court's modification of remedial measures in these cases was a matter peculiarly within its discretion, and its judgment should be accorded deference by the Court. The district court was in the best position to consider the effects of the proposed layoff program on the ongoing remedial process. The district court had the benefit of familiarity with the history of these proceedings, local social and political conditions and the absence of alternative measures. The district court exercised its discretion soundly by issuing orders of limited scope. The orders had temporary effect, limited only to the emergency at hand; they preserved as fully as possible the workings of the Massachusetts seniority statute; they did not require non-minorities to bear the full brunt of the layoff program or deprive non-minorities of opportunity for recall without loss of former rank; and they served the compelling public interest of eliminating racial exclusivity in the composition of Boston's Police and Fire Departments.

The district court's orders were not barred by other principles of law. The orders were not invalid as unconstitutional "reverse discrimination" because they were essential to effective remediation of race discrimination already adjudicated. They were necessary to achieve a compelling governmental interest. The court's orders imported no stigma on non-minorities and did not unnecessarily trammel their interests. The provisions and policies of Title VII, likewise, erect no bar to the relief ordered, for these cases entail claims of constitutional violation, and the relief available to remedy a constitutional violation is not limited by any remedial restraint reflected in Title VII. The district court's orders also permissibly superseded operation of the Massachusetts civil service statute even though the statute itself is not unlawful. The court's orders were necessary to effectuate a remedial process based upon liability otherwise established, and the validity of the seniority statute does not permit its operation to impede a necessary judicial remedy.

The district court's orders were proper remedies under Title VII. Title VII has among its objectives the elimination of the effects of past denial of equal employment opportunity. This has been consistently held by the federal courts to require remedial measures that are not limited to placing individual victims in their rightful place, and this interpretation by the courts of their remedial power was approved by Congress when it enacted the Equal Employment Opportunity Act of 1972. The approach, moreover, is particularly appropriate when implementing a remedy for exclusion of racial minorities from public employment. Where an entire racial group has been systematically excluded from employment, the victims of discrimination are not limited to those who applied and were rejected. To provide complete relief, courts must have the power, carefully exercised, to implement non-victim specific relief. Likewise, they must have the power, as here, to use such relief in order to prevent the frustration of an ongoing remedial process.

Section 703(h) of Title VII does not bar the modified relief ordered here. Liability having been established independently of operation of the Massachusetts civil service seniority system, Section 703(h) in no way limits or qualifies relief otherwise appropriate. Seniority should not singlehandedly override all other factors properly considered by the court in effectuating the remediation of proven race discrimination. Civil service seniority expectations are not vested rights; they are defeasible and modifiable; they are but one policy of the state statute itself. The district court's orders did not significantly impair the principal purposes served by seniority systems. They did, however, serve a policy of highest national priority by preventing the frustration of the ongoing remedial process.

Finally, the district court's orders were not barred by the Tenth Amendment. These are cases brought under the Fourteenth Amendment and statutes enforcing it. These laws restrict state power, and the Tenth Amendment, accordingly, does not limit their remedial scope.

Argument

I. The Standard Of Review Is Abuse Of Discretion

These cases involve district court modification of equitable relief. The district court has inherent power to modify ongoing relief to adapt to new or changed circumstances. *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244, 251 (1968); *System Fed'n No. 91, Ry. Emp. Dept.* v. *Wright*, 364 U.S. 642, 647-48 (1961); *United States* v. *Swift & Co.*, 286 U.S. 106, 114 (1932). "A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need . . . . The result is all one whether the decree has been entered after litigation or by consent." *Id.* at 114.

Appellate review is limited to determining whether the district court abused its discretion. *Brotherhood of Loco-*

motive Engineers v. *Missouri-Kansas-Texas R.R. Co.*, 363 U.S. 528, 535 (1960); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 446 (1975) (Rehnquist, J., concurring). "In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow." *Lemon* v. *Kurtzman*, 411 U.S. 192, 200 (1973); *accord Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971); *International Salt Co.* v. *United States*, 332 U.S. 392, 400-01 (1947). Subsequent modification of such relief requires perforce wide discretion. *System Fed'n No. 91, Ry. Emp. Dept.* v. *Wright, supra*, 364 U.S. at 647-48. Appellate review of any order under Fed.R.Civ.P. 60(b) is similarly limited. *Browder* v. *Director, Ill. Dept. of Corrections*, 434 U.S. 257, 263 n.7 (1978).

Appellate review of equitable remedies also requires deference to the judgment of the district court. It is the district judge who applies controlling principles of law with the benefit of intimate familiarity with local concerns, conditions and developments. *E.g.*, *Franks* v. *Bowman Transportation Co., Inc.*, 424 U.S. 747, 779-80 (1976); *Swann* v. *Charlotte-Mecklenburg Bd. of Ed., supra*, 402 U.S. at 12. District judges are "uniquely situated . . . to appraise the societal forces at work in the communities where they sit." *Columbus Bd. of Ed.* v. *Penick*, 443 U.S. 449, 470 (1979) (Stewart, J., concurring). It is the district judge also who has the experience of having managed the litigation in the past. See, *e.g.*, *Brown* v. *Board of Ed.*, 349 U.S. 294, 299 (1955).

The district court's exercise of discretion must apply correct principles of law, and equity may not vary like "the Chancellor's Foot." *Albemarle Paper Co.* v. *Moody, supra*, 422 U.S. at 416-17. However, rules of law governing the remediation of race discrimination should not be rigid. Equity requires a sensitive weighing of practicalities and balancing of public and private interests. As the Court has often noted:

> In constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable. 'Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.'

Lemon v. *Kurtzman, supra*, 411 U.S. at 200. District courts must be left with flexibility to address the varied situations which they confront. They must not be deprived of the capacity to employ practical wisdom in fashioning remedies.

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

Swann v. *Charlotte-Mecklenburg Bd. of Ed., supra*, 402 U.S. at 15, quoting *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-30 (1944).

II. The District Court's Orders Were Appropriate Measures Within An Ongoing, Yet Incomplete, Remedial Program Based Upon Findings Of Unconstitutional Exclusion Of Blacks And Hispanics From Boston's Police And Fire Departments

A. *The District Court Properly Acted In The Context Of Continuing Correction Of A Condition Created By Racial Discrimination*

These are cases of unconstitutional exclusion of racial minorities from Boston's Police and Fire Departments. Plain-

tiffs have not pursued individual tort claims; rather, they originally challenged long standing governmental practices of race discrimination and recently sought modification of relief in order to prevent the frustration and eradication of an ongoing remedy. Violations of constitutional right having been found, the powers of the district court to afford a remedy are broad. "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, *supra*, 402 U.S. at 15. *Accord Louisiana* v. *United States*, 380 U.S. 145, 154 (1968).

Where race discrimination by the state is concerned, the federal court should remedy "the condition that offends the constitution," *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, *supra*, 402 U.S. at 15-16, as well as the condition found to "flow from such a violation." *Milliken* v. *Bradley*, 433 U.S. 267, 282 (1977). When institutions of government are found to bear the imprint of race discrimination, the court must take steps to eliminate "all vestiges" of the discrimination "root and branch." *Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 200 and n.11 (1973); *accord Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, *supra*, 402 U.S. at 15; *Dayton Bd. of Ed.* v. *Brinkman*, 443 U.S. 526, 537 (1979). The district court "has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States*, *supra*, 380 U.S. at 154.

Here, the courts had found that official practices had long excluded blacks and hispanics from Boston's Police and Fire Departments. The condition produced by these practices—"gross discriminatory underrepresentation" of racial minorities, *Boston Chapter, NAACP, Inc.* v. *Beecher*, *supra*, 679 F.2d at 972 (Pet.App. A 13-14)—was the basis of the district court's original remedial orders. These prior remedial orders, to which all parties agreed, sought to eliminate the effects of

this past discrimination. They were framed to correct the racial exclusivity of public safety departments which past unlawful practices had brought about. Relief was to be accomplished through race-conscious affirmative measures involving priority classifications and numerical goals and through compliance measures addressed to civil service examinations, civil service certification, recruitment, physical and mental testing and the like. The parties and the court looked to these measures to effect a remedy which was "to be more than token." *Castro* v. *Beecher, supra*, 459 F.2d at 737. When the remedial target was reached and the effects of past discrimination fully eliminated, the remedial jurisdiction of the district court was to cease.

Although the district court was empowered to implement a remedy which "promises realistically to work, and promises realistically to work *now*," *United States* v. *Montgomery County Bd. of Ed.*, 395 U.S. 225, 235 (1969) (emphasis in original), quoting *Green* v. *County School Bd.*, 391 U.S. 430, 439 (1968), the court and the parties pursued a cautious remedial program which was to work over time. Its effectiveness depended upon the continuing commitment of the City to the remedial process. The original decrees were premised on an assumption that municipal hiring practices, subject to the original measures of affirmative action, would in time produce Police and Fire Departments which were free from the imprint of discrimination and which were fairly representative of a population having genuinely equal opportunity for employment. *Castro* v. *Beecher, supra*, 365 F.Supp. at 665. *Cf. International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 339 n.20 (1977).

Six years of affirmative judicial relief produced progress. By the time of the proposed layoffs in 1981, however, the remedy was not complete. Blacks and hispanics remained substantially underrepresented in Boston's Police and Fire Departments. The remedial process had increased minority representation to 11.7 percent in the Police Department and to 14.7 percent in

the Fire Department, but minority representation remained far below the remedial target, and considerably below the level of minority representation in the City's population at the time of the original decrees. By 1981, the "lingering effects" of racial exclusion had not been eradicated, and the process of judicial remedy remained ongoing.

The City of Boston was obligated not to take steps which would "impede the process" of eradicating these effects of past discrimination. *Dayton Bd. of Ed.* v. *Brinkman, supra*, 443 U.S. at 538. Following judicial findings that discrimination had established a system of racial exclusion from Boston's public safety forces, both the state and its municipal subdivision were under "a continuing duty to eradicate the effects of that system." *Columbus Bd. of Ed.* v. *Penick, supra*, 443 U.S. at 458. Since the remedy was incomplete, the district court properly took into account the impact of the City's 1981 proposed layoffs on the ongoing remedial process. As the Court stated in a similar setting involving school desegregation: "such a proposal must be judged according to whether it hinders or furthers the process of school desegregation. If the proposal would impede the dismantling of the dual system, then a district court, in the exercise of its remedial discretion, may enjoin it from being carried out." *Wright* v. *Council of the City of Emporia*, 407 U.S. 451, 460 (1972).

The City's decision to impose massive reductions in Police and Fire Department personnel would have dramatically impeded the remedial process. No less than 57 percent of the minority police officers and 45 percent of the minority firefighters appointed during the continuing remedial phase of the litigation were to be discharged. Minority representation in the Police Department would drop from 11.7 percent to 6.2 percent, from 39 percent of the remedial target to 21 percent of that target. Minority representation in the Fire Department would drop from 14.7 percent to 9.1 percent, from 49 percent of the remedial target to 30 percent of the target. The City's program of layoffs would also, for all intents and pur-

poses, have eliminated the remedial mechanism. It would have placed the agreed upon remedial target practically out of reach. Unless it took action, the district court was faced, at the very least, with the possibility of extended supervision of relief. Indeed, given the apparent elimination of recruitment and hiring for some time to come, the district court faced the prospect that its remedial measures would atrophy. Surely the district court was not bound to let the City interfere with the remedial program and the accomplishment of the yet unattained objective. The City's reduction in force program "was enjoined because of the effect it would have had at the time upon the effectiveness of the remedy ordered." *Id.* at 470. Modification of prior relief was warranted, for an equitable remedy may be modified in order to achieve its original purpose. *United States* v. *Armour & Co.*, 402 U.S. 673, 681 (1971); *United States* v. *United Shoe Mach. Corp.*, *supra*, 391 U.S. at 249, 251-52; *Chrysler Corp.* v. *United States*, 316 U.S. 556, 562 (1942); *Brown* v. *Neeb*, 644 F.2d 551, 560, 565 (6th Cir. 1981); *Equal Employment Opportunity Comm'n* v. *United Ass'n of Journeymen and Apprentices*, 438 F.2d 408, 414 (6th Cir.), *cert. denied*, 404 U.S. 832 (1971); *Evans* v. *Buchanan*, 512 F.Supp. 839, 849 (D.Del. 1981); see *Sarabia* v. *Toledo Police Patrolman's Ass'n*, 601 F.2d 914, 918 (6th Cir. 1979).

Modification of the district court's prior decrees was necessary simply to prevent the substantial eradication of the partial remedy which had been accomplished to date. *Brown* v. *Neeb*, *supra*, 644 F.2d at 560; *Perrotte* v. *Percy*, 489 F.Supp. 212, 214 (E.D.Wis. 1980); *Bolden* v. *Pennsylvania State Police*, 73 F.R.D. 370, 372 (E.D.Pa. 1976); *cf. Exxon Corp.* v. *Texas Motor Exchange of Houston, Inc.*, 628 F.2d 500, 503 (5th Cir. 1980). The massive reductions in force in the Police and Fire Departments threatened to "seal into permanent existence the injustices of the past." *United States* v. *Louisiana*, 225 F.Supp. 353, 393 (E.D.La. 1963), *aff'd*, 380 U.S. 145 (1965). Permitting the City to address its financial problems

by laying off one-half its minority police officers and firefighters would permit it to withdraw the remedy and to "freeze the status quo that is the very target of all desegregation processes." *McDaniel* v. *Barresi*, 402 U.S. 39, 41 (1971).

The district court ruled that further action was necessary to prevent a "grievous wrong"—that is, "the substantial eradication of all progress made by blacks and hispanics in securing public employment as members of either the police or fire department since 1970." 522 F.Supp. at 877 (Pet.App. A 37). The court of appeals agreed, 679 F.2d at 972 (Pet.App. A 14-15):

> there was ample showing that changed circumstances would totally vitiate the intended effect of the original decrees unless the proposed modifications were made. . . . Failure to take the action here challenged would result in undoing most all that had been accomplished by the original decrees.

The courts below "[took] into account the particularities of the situation" and fulfilled their obligation to take "all reasonable methods . . . available to formulate an effective remedy." *Hills* v. *Gautreaux*, 425 U.S. 284, 297 (1976), quoting *Davis* v. *School Comm'rs of Mobile County*, 402 U.S. 33, 37 (1971) and *North Carolina Bd. of Ed.* v. *Swann*, 402 U.S. 43, 46 (1971).

B. *Proper Remedy For Unconstitutional Exclusion Of Racial Minorities From Government Service Is Not Confined To Relief For Individual Victims*

Plaintiffs did not sue a private employer, and they did not sue simply to secure individual employment. These are suits to eliminate the consequences, as well as the practices, of unconstitutional exclusion of racial minorities from the police and fire departments of a major city with a large, and growing,

minority population. Until the consequences of the discrimination are corrected, two of Boston's most visible institutions of government bear publicly the mark of official race discrimination.

The institutions of the state cannot be permitted to stand in a form fashioned by race discrimination. For government to manifest itself as the product of past discrimination offends the Fourteenth Amendment. The state cannot bring itself into constitutional compliance "simply by ending its unlawful acts and adopting a neutral stance." *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 362 (1978) (Brennan, White, Marshall and Blackmun, JJ.). Affirmative steps must be taken so that the effects of past discrimination are "eliminated root and branch." *Green* v. *County School Bd.*, *supra*, 391 U.S. at 438.

The institutions of government both reflect and influence the values of the community. They can announce a commitment to equality of opportunity, access and service, or, by remaining in a form and structure fashioned by past discrimination, they can sanction the stigma of racial exclusion. *Cf. Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, *supra*, 402 U.S. at 26; *Brown* v. *Bd. of Ed. of Topeka*, 347 U.S. 483, 494 (1954). Government can be of the people or not.

> From local law enforcement to social services, each citizen in a community is in constant contact with many local agencies. The importance of equal opportunity in these agencies is, therefore, self-evident. In our democratic society, participatory government is a cornerstone of good government. Discrimination by government therefore serves a doubly destructive purpose. The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in that particular community, but also creates mistrust, alienation, and all too often hostility toward the entire process of government.

S.Rep. No. 415, 92d Cong., 1st Sess., reprinted in Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, *Legislative History of the Equal Employment Opportunity Act of 1972*, p. 419 (1972).

Petitioners' argument that race discrimination which is institutionalized in the fabric of public employment may be remedied by individualized relief alone, confines the compass of constitutional remedy far too narrowly. The "nature and scope of the constitutional violation," *Milliken* v. *Bradley*, *supra*, 433 U.S. at 280, broadens the expanse, as well as sets the limit, of appropriate remedy. A decree which is "aptly tailored to remedy the consequences of the constitutional violation" does not exceed the scope of the violation. *Id.* at 287.

Race discrimination in public employment, in particular, is institutionalized; it is, unfortunately, neither individualized nor isolated. See H.R.Rep. No. 238, 92d Cong., 1st Sess., reprinted in 1972 U.S. Code Cong. and Admin. News 2152. Where race discrimination has shaped the personality of government, relief must correct the distortion of institutional character.

Just as the district court must do more than bar future wrong, it must recognize that the "effects" of discrimination are not merely matters of ascertainable individual injury. Where long settled practices have excluded racial minorities from government employment, it is not just that identifiable members of a discrete set have been discouraged from seeking to advance their position. It is, rather, that an entire segment of the population, defined by color of skin, never sought, or thought, to volunteer for victimization by the state. *Cf. Dothard* v. *Rawlinson*, 433 U.S. 321, 330 (1977); *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 363-67; *Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir. 1971), *modified on rehearing en banc*, 452 F.2d 327, 331, *cert. denied*, 406 U.S. 950 (1972).

The federal courts have recognized that, where the shape and workings of government are involved, remediation of un-

constitutional race discrimination is not bounded by tort law doctrines confining relief to compensation only to, and only to the extent proved by, specific individual victims. A race-conscious remedy "that aids persons perceived as members of relatively victimized groups" is proper if predicated upon judicial findings of constitutional violation. *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 307 (opinion of Powell, J.); *accord id.* at 325 (opinion of Brennan, White, Marshall and Blackmun, JJ.). "Such relief does not require as a predicate proof that recipients of preferential advancement have been individually discriminated against; it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination." *Id.* at 363. Here, moreover, the remedy is not premised upon assumptions of generalized, or "societal," discrimination. Compare, *e.g.*, *id.* at 305-06, 309 (Powell, J.). Here, race discrimination has been adjudicated, and Boston's Police and Fire Departments themselves have been found to reflect "gross discriminatory underrepresentation" of blacks and hispanics. *Boston Chapter, NAACP, Inc.* v. *Beecher*, *supra*, 679 F.2d at 972 (Pet.App. A 13-14).

Similarly, where past discrimination has excluded racial minorities from effective resort to voting franchise, remedial measures have extended to all members of the racial class without requirements of proof of individual victimization. *E.g.*, *Louisiana* v. *United States*, *supra*, 380 U.S. at 155; *United States* v. *Lynd*, 349 F.2d 785, 787-88 (5th Cir. 1965); *United States* v. *Ward*, 349 F.2d 795, 805-06, *modified*, 352 F.2d 329 (5th Cir. 1965); *United States* v. *Mississippi*, 339 F.2d 679, 685 (5th Cir. 1964). Where discrimination in institutions of government is against an entire racial group, a carefully crafted remedy should be permitted to afford the victimized group the opportunity to achieve the position it would likely have achieved but for the discrimination. United States Commission on Civil Rights, *Affirmative Action in the 1980's: Dismantling the Process of Discrimination* 39-40 (1981) (U.S.

Comm'n on Civ. Rts.); Duncan, *The Future of Affirmative Action: A Jurisprudential/Legal Critique*, 17 Harv.C.R.-C.L. L. Rev. 503, 512-13 (1982) (Duncan).

The challenge raised by petitioners to any relief which is not grounded on individualized proof of victimization and individualized proof of "rightful place" is indeed radical. It assaults a decade of effort by the lower federal courts to deal with the intractable problems of remedying governmental race discrimination. Discriminatory exclusion of racial minorities from the nation's police and fire departments has been nearly universal. (See *infra*, Appendices B and C.) The federal courts have consistently found it necessary, in order to eradicate the present effects of past discrimination, to employ remedial measures which benefit members of racial groups long excluded from police and fire forces, without requiring demonstration of individual victimization. *E.g.*, Second Circuit: *Ass'n Against Discrimination* v. *City of Bridgeport*, 647 F.2d 256, 279-87 (2d Cir. 1981), *cert. denied*, ____ U.S. ____, 102 S.Ct. 1611 (1982); *United States* v. *City of Buffalo*, 633 F.2d 643, 647 (2d Cir. 1980); *Vulcan Society of New York City Fire Department, Inc.* v. *Civil Service Comm'n*, 490 F.2d 387, 398-99 (2d Cir. 1973); *Bridgeport Guardians, Inc.* v. *Members of the Bridgeport Civ. Serv. Comm'n*, 482 F.2d 1333, 1340-41 (2d Cir. 1973); Third Circuit: *Erie Human Relations Comm'n* v. *Tullio*, 493 F.2d 371, 374-75 (3rd Cir. 1974); *Commonwealth of Pa.* v. *O'Neil*, 473 F.2d 1029, 1030 (3rd Cir. 1973) (en banc); Fifth Circuit: *NAACP* v. *Allen*, 493 F.2d 614, 617-20 (5th Cir. 1974); *Morrow* v. *Crisler*, 491 F.2d 1053, 1055-56 (5th Cir.) (en banc), *cert. denied*, 419 U.S. 895 (1974); Seventh Circuit: *United States* v. *City of Chicago*, 549 F.2d 415, 436 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977), *remedial order reconsidered and aff'd*, 631 F.2d 469, 476 (1980); Eighth Circuit: *Firefighters Institute for Racial Equality* v. *City of St. Louis*, 588 F.2d 235, 240-41 (8th Cir. 1978), *cert. denied*, 443 U.S. 904 (1979); *Carter* v. *Gallagher*,

supra, 452 F.2d 328-29, 331; Ninth Circuit: *Davis* v. *County of Los Angeles*, 566 F.2d 1334, 1342-43 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979). These are the courts which have found, over and over, violations of the constitutional prohibition of race discrimination. These are the courts which have had "to grapple with the flinty, intractable realities of day-to-day implementation of those constitutional commands." *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, *supra*, 402 U.S. at 6. In announcing the "large constitutional principles" which must inform the practical remedies administered by the lower courts, this Court "must take into account their experience." *Id.*

C. *The District Court's Orders Were Limited In Scope, Took Competing Private Interests Into Account And Served The Public Interest*

The district court's orders reflect the weighing of practicalities and balancing of public and private interests which are the hallmarks of equity. They did not excessively intrude upon either the interests of the state or the interests of non-minority officers.

The orders were temporary maintenance orders, preserving the status quo in the face of a particular threatened exigency. The orders were addressed to the City's 1981 reduction in force program only; they did not require the permanent maintenance of minimum minority representation. Compare *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, *supra*, 402 U.S. at 24-25. The argument based upon the asserted permanence of the district court's orders (Brief for Boston Firefighters Union p. 25, 28 n.9; Brief for the United States as Amicus Curiae at p. 9 n.8; Brief for Anti-Defamation League as Amicus Curiae p. 8) disregards their plain language. A decree is to be read in light of what it provides, *Swift & Co.* v. *United States*, 276 U.S. 311, 328 (1928); *Schine Chain Theatres* v. *United States*, 334 U.S. 110, 126 (1948), and the district court's orders make

no provision for permanent restraint. Indeed, they recite as their sole basis the City's current layoff program—namely, "the effective and proposed reductions in force." *Castro* v. *Beecher, supra*, 522 F.Supp. at 877 (Pet.App. A 28). "The language of an injunction must be read in the light of the circumstances surrounding its entry: the relief sought by the moving party, the evidence produced at the hearing on the injunction, and the mischief that the injunction seeks to prevent." *United States* v. *Christie Industries, Inc.*, 465 F.2d 1002, 1007 (3rd Cir. 1972). *Accord Haskell* v. *Kansas Natural Gas Co.*, 224 U.S. 217, 223 (1912); *Swift & Co.* v. *United States, supra*, 276 U.S. at 328. Relief was sought here from the threatened effects of particular government action; it was neither requested nor justified as a matter of permanent right or permanent remedy. Permanence, in fact, is at odds with the entire remedial process, which contemplates eventual termination, without revival, of the district court's jurisdiction.

The district court's orders also served limited purposes. They prohibited reduction of minority representation due to the 1981 layoff program, but they did not bar any reduction in minority representation arising from other causes, including retirement, discipline, future personnel programs and the like. The orders did not bar the layoff of all minority officers. They did not require an increase in minority representation. They did not advance the original affirmative relief agreed to by the parties.

The orders did not require that white officers be replaced by new minority hires. *Tangren* v. *Wachenhut Services, Inc.*, 480 F.Supp. 539, 549 (D.Nev. 1979), *aff'd*, 658 F.2d 705 (9th Cir. 1981), *cert. denied*, ___ U.S. ___, 102 S.Ct. 1772 (1982); *Sisco* v. *J.S. Alberici Construction Co., Inc.*, 655 F.2d 146, 149 (8th Cir. 1981), *cert. denied*, ___ U.S. ___, 102 S.Ct. 1485 (1982). They certainly did not, as the Unions inaccurately suggest (Brief for Boston Firefighters Union p. 25; Brief for Boston Police Patrolmen's Union p. 25), require the termination of any officer, white or minority. It was the City

which chose to lay off police and fire officers, and it was the City which determined the magnitude of the program. If the layoffs affected white police officers hired prior to implementation of the court's original remedial measures (See Jt.App. 90; Brief for United States as Amicus Curiae p. 8 n.7), this was due to the magnitude of layoffs set by the City, to the refusal of state and municipal officals to devise alternative fiscal measures and to the civil service preference for disabled veterans, which operated to the advantage of approximately 63 otherwise junior officers (see *infra*, p. 60 and n.12).

The district court paid respect to seniority rights and other statutory preferences to the maximum extent possible. The orders permitted the City to terminate officers according to statutory priorities until the layoffs threatened the percentage of racial minorities obtaining at the outset of the program. If the City chose to lay off further officers, separate seniority lists were to be used, but seniority rankings and all preferences, governing both order of separation and order of possible recall, were to be applied within each list. *Castro* v. *Beecher*, *supra*, 522 F.Supp. at 878-79 (Pet.App. A 28-29; Pol.App. 2a-3a).

Additionally, the district court's orders did not overbear "the interests of the state and local authorities in managing their own affairs." *Milliken* v. *Bradley*, *supra*, 433 U.S. at 281. The court neither prohibited reductions in force nor prescribed staffing levels. When, in light of the questionable budgetary assumptions upon which the reduction in force program had been based, the court was invited to enjoin temporarily all layoffs pending resumption and resolution of political negotiations affecting the City's finances, it refused. (July 30, 1981 transcript p. 34-7; Fire App. 203-04). The court left the stalled political process to the politicians and took no steps to dictate solutions or limit options. See *Brown* v. *Neeb*, *supra*, 644 F.2d at 563. The court mandated no expenditure of public funds. The court did nothing to intrude upon the operations of either public safety department. Sig-

nificantly, the Police Commissioner and the Fire Commissioner did not oppose the relief sought. Nor did they appeal. *Cf. Hutto* v. *Finney*, 437 U.S. 678, 688 (1978).

The chief judge of the district court had the benefit of six years' experience with this case. He was familiar with both the background of ongoing relief and the current context of the City's reduction in force program. The weighing of relevant factors to determine their effect upon the process of remediation is "a delicate task that is aided by a sensitivity to local conditions, and the judgment is primarily the responsibility of the district judge." *Wright* v. *Council of the City of Emporia*, *supra*, 407 U.S. at 466. As in the past, *e.g.*, *Castro* v. *Beecher*, *supra*, 386 F.Supp. at 1284-85, the district court remained sensitive to the limitations upon the powers of the federal court. (See July 30, 1981 transcript pp. 25-27, 35-37). For these reasons his exercise of discretion is entitled to "special deference." *Hutto* v. *Finney*, *supra*, 437 U.S. at 688.

Equity in the end must serve the public weal, and a court of equity must weigh public as well private interests. These cases do not simply pose a competition between private interests. The public interest is deeply involved. Police officers and firefighters have special roles in our urban society. They are uniformed; they are visible; they have power over life and death. The services they perform are exceedingly broad. These are the servants of the state on whom the public looks to "create and maintain a feeling of security in the community." American Bar Assn., *Standards Relating to the Urban Police Function*, p. 4 (1973). See President's Commission on Law Enforcement and Administration of Justice, *Task Force Report*: *The Police*, p. 144 (1967).

Police officers and firefighters in Boston, as in other major cities, must perform their difficult and diverse tasks for a racially mixed population. Indeed, they must perform them for a rapidly growing minority community. Public safety officers must be able to communicate with and enjoy the confidence of the community they serve. Public safety cannot be

achieved by departments reflecting racial exclusiveness. See President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society*, p. 107 n.1 (1967); National Commission on the Causes and Prevention of Violence, *To Establish Justice and Insure Domestic Tranquility*, p. 24 (1970); National Advisory Commission on Criminal Justice Standards and Goals, *A National Strategy to Reduce Crime*, p. 75 (1973). Public safety is endangered, and violence and unrest are fostered, by racial exclusion. This lesson has surely been taught by our national history of civil strife. It has been confirmed by virtually every modern study of race riots and law enforcement. See, *e.g.*, National Advisory Commission on Civil Disorders, *Report of the National Advisory Commission on Civil Disorders*, pp. 299-300, 315 (1968); National Commission on the Causes and Prevention of Violence, *Violence in America*, p. 414 (1969); National Advisory Commission on Criminal Justice Standards and Goals, *Report of the Task Force on Disorders and Terrorism*, p. 125 (1976).

In Boston, governmental practices have long excluded racial minorities from the most visible of public institutions. To public perception, the Boston Police and Fire Departments have long worn, and continue to wear, the badge of discrimination—the mark of racial exclusion. Until that badge is discarded, the City's public safety departments cannot adequately perform their task. This the courts below recognized and properly took into account. See *Boston Chapter NAACP, Inc.* v. *Beecher, supra*, 679 F.2d at 977-78 (Pet.App. A24-25). So, too, have other lower courts when seeking to remedy, in practical and effective terms, past discriminatory exclusion of racial minorities from police and fire departments. See, *e.g.*, *Talbert* v. *Richmond*, 648 F.2d 925, 928, 931 (4th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982); *Detroit Police Officers' Ass'n* v. *Young*, 608 F.2d 671, 695-96 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981); *NAACP* v. *Allen, supra*, 493 F.2d at 621; *Bridgeport Guardians, Inc.* v. *Members of the Bridge-*

port Civ. Serv. Comm'n, supra, 482 F.2d at 1341; *Erie Human Relations Comm'n* v. *Tullio,* 360 F.Supp. 628, 630 (W.D.Pa. 1973); *Van Aken* v. *Young,* 541 F.Supp. 448, 469 (E.D.Mich. 1982); *Arnold* v. *Ballard,* 390 F.Supp. 723, 736 (N.D. Ohio 1975).

D. *The District Court's Orders Did Not Entail Unconstitutional Reverse Discrimination*

In prohibiting the City from reducing the current minority representation in its Police and Fire Departments, the district court ordered race-conscious relief. The recent decrees were entered in order to prevent the City's layoff program from frustrating and substantially eradicating an ongoing process of remediation. That remedial process had long been in place. It had the agreement, and depended upon the continuing commitment, of the parties; it had been ordered, and repeatedly reaffirmed, by the court. The entire remedial process was based upon the adjudication of discriminatory exclusion of blacks and hispanics from the City's Police and Fire Departments. The fact that the recent orders, and the prior orders, mandated race-conscious relief does not violate any right of non-minority officers to equal protection of the laww The orders served a compelling governmental interest and were necessary to its accomplishment.

The Court has by now established that race-conscious remedial measures are not unconstitutional when necessary to achieve a "compelling governmental interest." *Regents of the University of California* v. *Bakke, supra,* 438 U.S. at 299 (Powell, J.). See *Fullilove* v. *Klutznick,* 448 U.S. 448, 497-99 (1980) (Powell, J. concurring). Indeed, four members of the Court have concluded that race-conscious measures are lawful when they meet a lesser standard—that is, when they serve "important governmental objectives" and are "substantially related to the achievement of those objectives." *Regents of the University of California* v. *Bakke, supra,* 438 U.S. at 359

(Brennan, White, Marshall and Blackmun, JJ.). See *Fullilove* v. *Klutznick*, *supra*, 448 U.S. at 517-20 (Marshall, Brennan and Blackmun, JJ.). The August 7, 1981 orders of the district court meet both of these standards, for judicial remediation of the effects of race discrimination constitutes a compelling governmental interest. *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 300-02, 307-09 (Powell, J.); see *id.* at 362-64 (Brennan, White, Marshall and Blackmun, JJ.); *North Carolina Bd. of Ed.* v. *Swann*, *supra*, 402 U.S. at 45-6. The court of appeals expressly found that the past discrimination constituted "a 'compelling need' for a minority-conscious remedy." *Boston Chapter, NAACP, Inc.* v. *Beecher*, *supra*, 679 F.2d at 977. (Pet.App. A23). As Justice Blackmun has observed: "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetrate racial supremacy." *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 407.

Importantly, these cases involve judicial findings of race discrimination. The courts below were competent to make those findings. See *id.* at 300-02, 307-09 (Powell, J.). Indeed, they were findings which courts are especially competent to make, for they related to specific practices which had resulted in the systematic exclusion of blacks and hispanics from the particular municipal agencies affected by the district court's orders. The district court's orders did not rest on a mere presumption of generalized or "societal" discrimination. See *id.* at 307 (Powell, J.); compare *Fullilove* v. *Klutznick*, *supra*, 448 U.S. at 302-07 (Powell, J., concurring) (societal discrimination proper area for congressional findings).

Disadvantage to non-minority officers cannot bar judicial relief. Where liability has been established, relief is warranted. "After such findings have been made, the governmental interest in preferring members of the injured groups at

the expense of others is substantial, since the legal rights of the victims must be vindicated." *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 307 (Powell, J.). "When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible." *Fullilove* v. *Klutznick*, *supra*, 448 U.S. at 484 (Burger, C.J., White and Powell, JJ.), quoting *Franks* v. *Bowman Transportation Co., Inc.*, *supra*, 424 U.S. at 777. See *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 366 n.41 (Brennan, White, Marshall and Blackmun, JJ.); *Detroit Police Officers' Ass'n* v. *Young*, *supra*, 608 F.2d at 696. This is true whether the remedy addresses a constitutional violation or a statutory violation. See *Regents of the University of California* v. *Bakke*, *supra*, 448 U.S. at 300-02, 304-09 (Powell, J.). Indeed the principle underlies much of the remedial efficacy of Title VII itself. See, *e.g.*, *Franks* v. *Bowman Transportation Co., Inc.*, *supra*, 424 U.S. at 774-75, 777-78 (burden on "innocent" parties proper in implementing Title VII remedy); *Equal Employment Opportunity Comm'n* v. *American Telephone and Telegraph Co.*, 556 F.2d 167, 179-80 (3rd Cir. 1977), *cert. denied*, 438 U.S. 915 (1978) (same).

> An inevitable consequence of a court order which requires that more jobs be given to blacks than was previously the case, particularly where the total number of jobs actually available is on the decline, will be that fewer whites will be employed. However, compliance with the [Civil Rights] Act will frequently require that result.
>
> I am unwilling to concede that the court created the problem. On the contrary, the problem was created by the discriminatory action of the employers and/or the union. A court should respond by taking steps necessary to both undo the effects of past discrimination and also to prevent its future practice.

Vogler v. *McCarty*, 451 F.2d 1236, 1239 (5th Cir. 1971) (Clark, J. dissenting on other grounds).

The race classification reflected in the district court's August 7, 1981 orders imported no stigma. See *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 325 (Brennan, White, Marshall and Blackmun, JJ.); *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 165 (1977) (White, Stevens and Rehnquist, JJ.). There was no judicial oppression of a "discrete and insular minority." *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). The classification did not arise from any invidious purpose. Rather, it was the necessary consequence of judicial effort to prevent the frustration of the ongoing remedial process.

By setting minimum minority representation to be maintained during the course of the City's reduction in force program, the decrees altered the order of layoffs prescribed by statute. Some non-minority officers risked layoff who otherwise would have retained their jobs; some black and hispanic officers similarly would retain positions they otherwise would have lost. The means employed by the district court, however, were necessary to the achievement of its proper ends.

Massive terminations of minority officers would frustrate the court's established remedial process, and layoffs in accordance with strict seniority would produce this result. The district court, thus, had no choice but to supersede the statute. No efficacious alternative was available. See *Fullilove* v. *Klutznick*, *supra*, 448 U.S. at 510 (Powell, J.); *NAACP* v. *Allen*, *supra*, 493 F.2d at 619. It was not for the court to order job-sharing, early retirement, pay reduction or other measures within the ambit of labor negotiation or management prerogative. The court's capacity and function made the level of minority representation the only appropriate issue for its consideration. That the representation levels ordered were specific was a necessary feature of any judicial effort to prevent the frustration of the remedial process. The district court had to issue an order with specificity to permit compliance,

and the statutory scheme had no flexibility itself. The court, therefore, could not have ordered the Police and Fire Departments merely to take race into consideration as one relevant factor in implementing the layoff program. Compare *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 315-19 (Powell, J.). The objective of the remedial process was far from achieved, and it cannot be said that representation levels of 11.7 percent and 14.7 percent overreach a fair level of minority presence in the police and fire departments of a city with a minority population of almost 30 percent. See *Fullilove* v. *Klutznick*, 448 U.S. at 510 (Powell, J.).

The court's orders did not "unnecessarily trammel" the interests of non-minority officers and did not constitute an "absolute bar to advancement." *United Steelworkers of America* v. *Weber*, 443 U.S. 193, 208 (1979). Minority officers as well as non-minorities were left subject to layoff; all terminated officers were eligible for recall without loss of their original seniority rank for purposes of benefits, promotion and the like; and, in any event, the Police and Fire Departments remained overwhelmingly white. Finally, the orders were temporary. *Id.* They addressed the program of layoffs implemented in mid-1981; their reach extended no further.

E. *A Remedial Order May Supersede Otherwise Valid State Law In Order To Be Effective*

The district court was not required to find the seniority provisions of the Massachusetts civil service statute invalid, as a matter of substantive law, in order to modify its application. The remedial power of federal courts extends to setting aside otherwise valid state law when necessary to provide an effective remedy. This view of the permissible scope of remedial measures has been recognized by the Court. See, *e.g.*, *Louisiana* v. *United States*, *supra*, 380 U.S. at 154; *Wright* v. *Council of the City of Emporia*, *supra*, 407 U.S. at 459-60. And the rule is well-settled. See, *e.g.*, *United States* v.

Mississippi, supra, 339 F.2d at 684-85; *United States* v. *Duke*, 332 F.2d 759, 767-69 (5th Cir. 1963). Indeed, the court of appeals relied upon the principle, when it noted that "remedies to right the wrong of past discrimination may suspend valid state laws." *Boston Chapter, NAACP, Inc.* v. *Beecher, supra*, 679 F.2d at 975 (Pet.App. A20).

The lower federal courts which have assumed the specific task of remedying past exclusion of racial minorities from police and fire departments have consistently issued orders superseding the operation of otherwise valid civil service statutes, municipal ordinances, departmental regulations and other provisions of state law. *E.g.*, *Sarabia* v. *Toledo Police Patrolman's Ass'n, supra*, 601 F.2d at 918 (6th Cir. 1979); *United States* v. *City of Chicago, supra*, 549 F.2d at 438; *United States* v. *City of St. Louis*, 410 F.Supp. 948, *amended*, 418 F.Supp. 383, 386 (E.D.Mo. 1976), *aff'd in relevant part sub nom., Firefighters Institute for Racial Equality* v. *St. Louis*, 549 F.2d 506 (8th Cir. 1977) (consent decree), *cert. denied*, 434 U.S. 819 (1977); *Erie Human Relations Comm'n* v. *Tullio, supra*, 357 F.Supp. at 425; *Carter* v. *Gallagher, supra*, 452 F.2d at 319, 328; *Glass City Black Brothers United* v. *Neeb*, 540 F.Supp. 852, 855 (N.D.Ohio 1982); *Prate* v. *Freedman*, 430 F.Supp. 1373, 1375 (W.D.N.Y.), *aff'd*, 573 F.2d 1294 (2d Cir. 1977), *cert. denied*, 436 U.S. 922 (1978); *Dozier* v. *Chupka*, 395 F.Supp. 836, 860 (S.D.Ohio 1975); *Sheild Club* v. *City of Cleveland*, 370 F.Supp. 251, 256 (N.D.Ohio 1972); *See generally* Note, *Last Hired, First Fired Layoffs and Title VII*, 88 Harv.L.Rev. 1544, 1557-60 (1975) (Note, *Last Hired*).

The justification for the measure lies in its necessity. "Local restrictions must of course give way to orders necessary to make effective this court's decree." *Bridgeport Guardians, Inc.* v. *Members of Bridgeport Civ. Serv. Comm'n*, 354 F.Supp. 778, 798 (D.Conn. 1973), *aff'd in relevant part*, 482 F.2d 1333 (2d Cir. 1973). Similarly, where state laws interfere with continuing relief during the remedial phase of a

case, modification of remedy is in order. As the court put it in *Coffey* v. *Braddy*, 372 F.Supp. 116 (M.D.Fla. 1971), state law "now must be expressly suspended in order to maintain the integrity and vitality of that earlier order." *Id.* at 122.

F. *Washington v. Davis Did Not Limit The Power Of The District Court To Modify Its Prior Remedial Orders*

Both the police case and the fire case involved findings of unconstitutional race discrimination, although in neither case did the district court find purposeful discrimination. Judgment was entered in the police case in 1971 and affirmed on appeal one year later. Judgment was entered in the fire case in 1974 and affirmed the same year. In 1976 the Court decided *Washington* v. *Davis*, 426 U.S. 229 (1976), holding that to establish race discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment a plaintiff must prove racially discriminatory purpose. This intervening decision did not limit the district court's power to modify its prior remedial orders.

The issue now under review is the appropriateness of a remedial order. Securing relief is not the same as establishing liability, and judgment having already entered, plaintiffs need not have re-established their right to relief. *System Fed'n No. 91, Ry. Emp. Dept.* v. *Wright*, *supra*, 364 U.S. at 647; *Sarabia* v. *Toledo Police Patrolman's Ass'n*, *supra*, 601 F.2d at 919.

The argument based on *Washington* v. *Davis* is at best an argument for relief from the original judgment, and at worst a collateral attack upon that judgment. See *Dennison* v. *Los Angeles*, 658 F.2d 694, 695 (9th Cir. 1981); *Smith* v. *Missouri Pacific R.R. Co.*, 615 F.2d 683, 684-85 (5th Cir. 1980); *Prate* v. *Freedman*, *supra*, 430 F.Supp. at 1375. And, not having appealed from the original judgments on the basis of lack of

discriminatory purpose, see *Castro* v. *Beecher, supra*, 459 F.2d 725; *Boston Chapter, NAACP, Inc.* v. *Beecher, supra*, 504 F.2d 1017, the issue is not available to petitioners in opposing modification of relief later. Compare *Pasadena City Bd. of Ed.* v. *Spangler*, 427 U.S. 424, 432 (1976). Indeed, the state defendants should be estopped from asserting this challenge due to their repeated entry into remedial consent orders subsequent to *Washington* v. *Davis*. (See, *e.g.*, Jt.App. 32-34, 35, 64-69, 70-77.) See *Sarabia* v. *Toledo Police Patrolman's Ass'n, supra*, 601 F.2d at 919.

Moreover, the Court's decision in *Washington* v. *Davis* does not constitute a change of law of the sort which calls into question either the original judgments of liability or their sufficiency as predicates for relief. There are two types of cases in which ongoing equitable relief may be affected by a subsequent change in law. The first involves an intervening change of law which directly addresses the permissible scope of judicial remedy itself. See *Pasadena City Bd. of Ed.* v. *Spangler, supra*, 427 U.S. at 434-35. The second occurs when continued operation of an equitable remedy works to deprive a party of a right otherwise accorded by an intervening change of substantive law. See, *e.g.*, *System Fed'n No. 91 Ry. Emp. Dept.* v. *Wright, supra*, 364 U.S. at 648; *Pennsylvania* v. *The Wheeling and Belmont Bridge Company*, 59 U.S. (18 How.) 421 (1855).

Washington v. *Davis* bears on the present cases in neither of these ways. It did not announce new limits upon remedial powers, and it did not confer new rights which the district court's modified remedial orders impair. *Washington* v. *Davis* only announced and clarified an essential element of the original constitutional claim. "[P]recedential evolution," however, has never been sufficient to overturn a final judgment otherwise unappealable. *Mayberry* v. *Maroney*, 558 F.2d 1159, 1164 (3rd Cir. 1977); *accord Berryhill* v. *United States*, 199 F.2d 217, 219 (6th Cir. 1952); *Lehman Co. of*

America v. *Appleton Toy & Furniture Co.*, 148 F.2d 988, 990 (7th Cir. 1945).

The state officials also argue that, in light of *Washington* v. *Davis*, modification of the prior remedial orders was beyond the "nature and extent" of the violation (Brief for State Petitioners p. 54). The officials do not, however, challenge the basis for the original relief, and purposefulness has no relevance to whether modification was required in order to prevent the eradication of ongoing relief.

Finally, the court of appeals observed that "[i]t is by no means clear that our decisions in the police and fire cases should have been different had they been decided after *Washington* v. *Davis* and *Arlington Heights*. . . ." *Boston Chapter, NAACP, Inc.* v. *Beecher*, *supra*, 679 F.2d at 971 (Pet.App. A 13). Although in its original opinions in both cases the district court recited that there had been no purposeful discrimination, intent was not a litigated issue. It was neither pleaded nor tried. *Castro* v. *Beecher*, *supra*, 334 F.Supp. at 935 and n.4, 944; *Boston Chapter, NAACP, Inc.* v. *Beecher*, *supra*, 371 F.Supp. at 519. The remarks of the district court, accordingly, were not findings. Purposefulness was never adjudicated. Yet, had intent been placed in issue, the findings of constitutional violation would likely have been the same. Purpose to discriminate may be proven by "systematic exclusion" of eligible members of the racial minority. *Washington* v. *Davis*, *supra*, 426 U.S. at 239, quoting *Akins* v. *Texas*, 325 U.S. 398, 403-04 (1945). It may be inferred from the "total or seriously disproportionate exclusion" of minorities. *Washington* v. *Davis*, *supra*, 426 U.S. at 242. The statistical disparity found by the district court in the original proceedings in these cases was "gross," *Boston Chapter, NAACP, Inc.* v. *Beecher*, *supra*, 679 F.2d at 972 (Pet.App. A 13), and the district court found a woefully non-job-related examination whose "discriminatory consequences" were "foreseeable by sophisticated persons." *Castro* v. *Beecher*, *supra*, 334 F.Supp. at 943. Undeniably, the City's officials were well aware of the long ex-

perience of exclusion of minorities from Boston's public safety departments.

G. *An Otherwise Appropriate Constitutional Remedy Is Not Precluded By The Provisions Or Policies Of Title VII*

Plaintiffs here sought and were afforded relief for constitutional claims, enforceable under 42 U.S.C. § 1983. Petitioners and amici argue that the district court's orders conflict with Title VII (but see *infra*, pp. 45-62). Regardless of the merit of this argument, the court's orders are appropriate constitutional remedies and stand on that independent basis. In claims of employment discrimination, Title VII does not occupy the field; it does not preclude remedies under 42 U.S.C. § 1983 which might extend beyond its own range. *Brown* v. *Neeb*, *supra*, 644 F.2d at 564; *Bolden* v. *Pennsylvania State Police*, 578 F.2d 912, 921 (3rd Cir. 1978). The arguments of amici (Brief for AFL-CIO as Amicus Curiae p. 3; Brief for the United States as Amicus Curiae p. 26) to the effect that Title VII controls the case are thus irrelevant.

Rights and remedies under Title VII are not exclusive of rights and remedies under other civil rights laws. "Despite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief." *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 459 (1975). "Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 48-49 (1974). Public employees, as well as those in the private sector, benefit from the breadth of available remedies.

> Although the Johnson case involved alleged discrimination by a private employer, Congress clearly expressed its intention also to allow state and local government employees to seek relief under either Title VII or the older Civil Rights Acts. Indeed, in the same House Report relied upon by the Supreme Court, the House Committee on Education and Labor stated:
>
> > In establishing the applicability of Title VII to State and local employees, the Committee wishes to emphasize that the individual's right to file a civil action in his own behalf, pursuant to the Civil Rights Acts of 1870 and 1871, 42 U.S.C. §§ 1981 and 1983, is in no way affected . . . . The bill, therefore, by extending jurisdiction to State and local government employees does not affect existing rights that such individuals have already been granted by previous legislation.
>
> H.R. Rep. No. 92-238, *supra*, at 18-19, U.S. Code Cong. & Admin. News 1972, 2137, 2154.

Torre v. *Barry*, 661 F.2d 1371, 1373 (D.C.Cir. 1981).

The result reflects a cardinal principle of statutory construction: "repeals by implication are not favored." *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939). It also reflects a more specific congressional policy to facilitate the remediation of race discrimination. In passing the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a *et seq.*, Congress declared that federal policy against discrimination was to be of the "highest priority." *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968). To accomplish the objective, Congress enacted new measures yet preserved pre-existing remedies as well. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 150-51 n.5 (1970) (Public Accommodations Title does not restrict remedy under 42 U.S.C. § 1983); *Johnson* v. *Railway Express Agency*, *supra* (Equal Employment Title does not restrict remedy under 42 U.S.C. § 1981); *Alexander* v. *Gardner-Denver Co.*, *supra* (Equal Employment Title does not supersede remedies under collective bargaining agreement); *Sullivan* v. *Little Hunting*

Park, Inc., 396 U.S. 229, 237-38 (1969) (Public Accommodations Title does not supersede § 1982). Cf. *Jones* v. *A.H. Mayer Co.*, 392 U.S. 409, 413-17 (1968) (Fair Housing Act of 1968 does not supersede 42 U.S.C. § 1982).

Indeed, the Court has frequently identified legislative history indicating that Title VII places no limit on rights and remedies otherwise available. See *Runyon* v. *McCrary*, 427 U.S. 160, 173-75 n.10 and 11 (1976); *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 48 n.9. For example, the Justice Department interpretive memorandum placed into the record by Senator Clark, one of the 1964 floor managers of the bill, states that "Title VII is not intended to and does not deny to any individual, rights and remedies which he may pursue under other Federal and State statutes." 110 Cong. Rec. 7207 (1964). And, in both 1964 and 1972 Congress rejected amendments which would have made Title VII exclusive in the area of employment discrimination and would have precluded remedies not in accord with the act. See 110 Cong. Rec. 13650-52; 118 Cong. Rec. 3368-73, 3959-65 (1972).

III. The District Court's Orders Were Proper Remedies Under Title VII

The district court's orders were appropriate remedial measures under Title VII. Although the court prohibited layoffs which would reduce current minority representation without requiring individual proof of victimization and individual proof of "rightful place," the orders properly served to prevent the City of Boston from frustrating ongoing remediation of the effects of long-practiced discrimination. The measure served the fundamental policy of Title VII and conflicted with none of its provisions.

A. *Judicial Relief Under Title VII Is Not Limited To Individual Victim "Rightful Place" Remediation*

The purpose of the act is to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429-30 (1971). The statute was enacted not to meet a sudden exigency but to eradicate deeply rooted, pervasively experienced and tenaciously maintained practices of discrimination. Enforcement of the statute should "endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 418, quoting *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354, 379 (8th Cir. 1973).

The remedial provisions of Title VII are contained in section 706(g), which provides, in part:

> If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, . . . or any other equitable relief as the court deems appropriate. . . .

42 U.S.C. § 2000e-5(g). By this provision Congress intended to vest the federal courts with broad equitable discretion to fashion a remedy as extensive and complete as the circumstances of adjudicated discrimination require. *Franks* v. *Bowman Transportation Co., Inc.*, *supra*, 424 U.S. at 763-65 (1976); *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 418-21.

Where discrimination is systematic, where it affects an entire racial group and where the effect is gross exclusion from

employment, remedial measures under Title VII may extend beyond individual victim, rightful place remediation, for a fundamental objective of Title VII is eradication of the effects of past discrimination. Having found a violation of the statute, the district court "has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Id.* at 418, quoting *Louisiana* v. *United States, supra*, 380 U.S. at 154; *United States* v. *United Brotherhood of Carpenters & J., Loc. 169*, 457 F.2d 210, 216 (7th Cir.), *cert. denied*, 409 U.S. 851 (1972).

> But where the imbalance is directly caused by past discriminatory practices it is readily apparent that if the rights of minority members had not been violated, many more of them would enjoy those rights than presently do so and the ratio of minority members enjoying such rights would be higher. . . . The effects of such past violation of the minority's rights cannot be eliminated merely by prohibiting future discrimination, since this would be illusory and inadequate as a remedy. Affirmative action is essential.

Rios v. *Enterprise Ass'n Steamfitters Local 638 of U.A.*, 501 F.2d 622, 631 (2d Cir. 1974).

To accomplish the remedial objectives of Title VII, the lower courts have repeatedly turned to remedies which are not victim specific. They have done so in cases involving exclusion of racial minorities from police and fire forces. See, *e.g.*, *Ass'n Against Discrimination* v. *City of Bridgeport, supra*, 647 F.2d at 282; *United States* v. *City of Buffalo, supra*, 633 F.2d at 647; *Firefighters Institute for Racial Equality* v. *City of St. Louis, supra*, 588 F.2d at 240-41; *United States* v. *City of Chicago, supra*, 549 F.2d at 437; *Louisville Black Police Officers Org., Inc.* v. *City of Louisville*, 511 F.Supp. 825, 839-40

(W.D.Ky. 1979); *Dozier* v. *Chupka*, *supra*, 395 F.Supp. at 859-60; *Shield Club* v. *City of Cleveland*, *supra*, 370 F.Supp. 251. They have done so to remedy discrimination by private employers as well. Indeed, use of non-victim specific remedies under Title VII is practically universal. See, *e.g.*, Second Circuit: *Rios* v. *Enterprise Ass'n Steamfitters Local 638 of U.A.*, *supra*, 501 F.2d at 629-30; *United States* v. *Wood, Wire and Metal Lath. Int'l U. Local No. 46*, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); Third Circuit: *United States* v. *Int'l Union of Elevator Const., Local Union No. 5*, 538 F.2d 1012, 1017-20 (3rd Cir. 1976); Fourth Circuit: *Chisholm* v. *United States Postal Service*, 665 F.2d 482, 498-99 (4th Cir. 1981); Fifth Circuit: *Phillips* v. *Joint Legislative Comm.*, 637 F.2d 1014, 1024, 1026 (5th Cir. 1981); *Local 53 of Int'l Ass'n of Heat & Frost I & A* v. *Vogler*, 407 F.2d 1047, 1055 (5th Cir. 1969); Sixth Circuit: *United States* v. *Masonry Cont. Ass'n of Memphis, Inc.*, 497 F.2d 871, 877 (6th Cir. 1974); *United States* v. *Local Union No. 212, IBEW*, 472 F.2d 634, 636 (6th Cir. 1973); *Sims* v. *Sheet Metal Workers Int'l Ass'n Local No. 65*, 489 F.2d 1023, 1027-28 (6th Cir. 1973); Seventh Circuit: *Crockett* v. *Green*, 534 F.2d 715, 718 (7th Cir. 1976); *United States* v. *United Brotherhood of Carpenters & J. Loc. 169*, *supra*, 457 F.2d at 220-21; Eighth Circuit: *United States* v. *N.L. Industries, Inc.*, *supra*, 479 F.2d at 377; Ninth Circuit: *United States* v. *Ironworkers Local 86*, 443 F.2d 544, 553-54 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); D.C. Circuit: *McKenzie* v. *Sawyer*, 684 F.2d 62, 79-80 (D.C. Cir. 1982). *See generally*, *United States* v. *Lee Way Motor Freight, Inc.*, 625 F.2d 918, 944 (10th Cir. 1979); *United States* v. *Local 38, IBEW*, 428 F.2d 144, 149-51 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970).

The legislative history of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, makes clear a congressional commitment to judicial remedies other than individual

victim, rightful place remediation.[8] Congress re-enacted and amended section 706(g) in 1972 against a background of judicial construction of Title VII. Prior to passage of the 1972 act, Title VII had been held to authorize affirmative, non-victim specific relief. Federal courts had required admission of specific percentages of minorities to apprenticeship programs and establishment of special programs for minorities only, *United States* v. *Ironworkers Local 86*, 315 F.Supp. 1202, 1247-48 (W.D.Wash. 1970), *aff'd*, 443 F.2d 544, 553-54 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); preferential work registration, examination and referral procedures, *United States* v. *Sheet Metal Workers Inc. Ass'n Local U. 36*, 416 F.2d 123, 132-33 (8th Cir. 1969); and union referrals of one black worker for each white worker, *Local 53 of Int'l Ass'n of Heat & Frost I & A* v. *Vogler*, *supra*, 407 F.2d at 1055. See *United States* v. *Local 38, IBEW*, *supra*, 428 F.2d at 149-51 (remanding for entry of affirmative relief).

As a general rule, when Congress, without indicating a contrary intention, amends a statute which has been judicially construed, it is presumed to approve that construction. *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 102 S.Ct. 1825, 1841 n.66 (1982). Here, moreover, the legislative history indicates express approval of judicial remedies extending beyond victim specific relief. The section-by-section analysis of the final version of the bill submitted to the Senate with the conference report stated:

> In any area where the new law does not address itself, or in any area where a specific contrary intention is not

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[8] The legislative history of the 1964 Civil Rights Act, on the other hand, reveals little specific consideration of the remedial powers of the federal courts. Instead, congressional attention was fixed upon the pervasive national problem of race discrimination. It was also directed toward reaching compromise on numerous questions regarding what practices should constitute unlawful discrimination. *See generally*, Equal Employment Opportunity Commission, *Legislative History of Titles VII and XI of Civil Rights Act of 1964*.

> indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.

118 Cong. Rec. 7166.

Committee reports and statements by the congressional leadership echo the point. The *Local 53* (Asbestos Workers), *Sheet Metal Workers* and *Ironworkers* cases were expressly cited, and the text of the *Ironworkers* case was placed into the record. H.Rep. 238, *supra*, 2144 n.2, 2149 n.4; 118 Cong. Rec. 1671-75. Senator Dominick placed into the record a statement from the EEOC's annual report for fiscal year 1970 that "The Commission feels that the course of litigation over the past year has been encouraging and that the law has developed in a liberal fashion appropriate to a humanitarian and liberal statute." 118 Cong. Rec. 697. Representative Perkins, Chairman of the House Committee on Labor and Education, noted that:

> The development of case law in the area of employment discrimination in recent years has made it increasingly clear that the most difficult problem encountered is not whether discrimination has occurred but what the appropriate remedy is to be. The question of remedy is further complicated when discriminatory practices are found to be inherent in basic methods of recruitment, hiring, placement or promotion.

117 Cong. Rec. 31960 (1971). And Senator Javits, one of the floor leaders of the Senate bill, contrasted the availability of non-victim specific affirmative relief under Title VII with the use of quotas under Executive Order 11246 by observing that, under Title VII, "[a]ffirmative action may be ordered, but only as a remedy in a case of proven discrimination." 118 Cong. Rec. 582.

The issue of the proper extent of remedial orders under Title VII was squarely joined over the Ervin amendment, which would have prohibited any requirement of employment "in either fixed or variable numbers, proportions, percentages, quotas, goals or ranges." *Id.* at 1662. In response to the proposal, Senator Javits pointed out that the Ervin amendment would prohibit "[t]he whole concept of 'affirmative action' as it has been developed under Executive Order 11246 and as a remedial concept under Title VII." *Id.* at 1664. Senator Ervin argued that the amendment did nothing more than underline the existing provisions of section 703(j), but Senator Javits noted that "the courts have rejected much of the argument that we should — what in effect this amendment does — preclude preferential treatment under any and all circumstances, because it runs afoul of section 703(j)." *Id.* at 1665.[9] Senator Javits also argued that:

> the amendment . . . would deprive the courts of the opportunity to order affirmative action under Title VII of

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[9] Section 703(j) was designed to serve a specific and limited purpose — to preclude a finding of unlawful discrimination "solely on the basis of evidence that an imbalance exists . . ., without supporting evidence of another nature that the respondent has engaged or is engaging in such practice." 110 Cong. Rec. 9881-82 (1964) (Remarks of Senator Allott). Congress did not intend Title VII to require, as a matter of simple right and duty, that an employer maintain a racially balanced workforce, see 110 Cong. Rec. 7213 (1964), and section 703(j) was introduced to confirm such limits upon the requirements of the act, see *id.* at 12723 (Remarks of Sen. Humphrey).

However, in adopting section 703(j), Congress exhibited no intention to affect the remedies available to a federal court once a violation of the act had been established. *United Steelworkers* v. *Weber*, *supra*, 443 U.S. at 205 n.5. "[T]hat section cannot be construed as a ban on affirmative relief against continuation of effects of past discrimination. . . . Any other interpretation would allow complete nullification of the stated purposes of the Civil Rights Act of 1964." *United States* v. *Local 38, IBEW*, *supra*, 428 F.2d at 150. The result has been reached consistently by the lower courts, see, *e.g.*, *United States* v. *Ironworkers Local 86*, *supra*, 443 F.2d at 553-54; *Local 53 of Int'l Ass'n of Heat & Frost I. & A.* v. *Vogler*, *supra*, 407 F.2d at 1053-55. It is not challenged by petitioners or amici here.

> the type which they have sustained in order to correct a history of unjust and illegal discrimination in employment and thereby further dismantle the efforts to correct these injustices.

Id. Senator Williams joined Senator Javits:

> — I am afraid — I am desperately afraid — that this amendment would strip Title VII of the Civil Rights Act of 1964 of all its basic fiber. It can be read to deprive even the courts of any power to remedy clearly proven cases of discrimination —
>
> — This amendment raises the real threat of destroying any potential for effective law enforcement. If this amendment is accepted, I earnestly suggest that we will have a law, but there will be little chance for order under the law again if this amendment should prevail.

Id. at 1676. The Ervin amendment was soundly defeated. *Id.*

"Thus we have in this instance unusually clear evidence that Congress approved the pre-1972 federal court interpretation of the scope of § 706(g) remedial power conferred by the 1964 Act. That indication is entitled to great weight." *United States* v. *Int'l Union of Elevator Const. Local Union No. 5, supra*, 538 F.2d at 1019-20; *accord Rios* v. *Enterprise Ass'n Steamfitters Local 638 of U.A., supra*, 501 F.2d at 630-31; *United States* v. *Local Union No. 212, IBEW, supra*, 472 F.2d at 636. In short, "Congress, in enacting the 1972 amendments to Title VII, explicitly considered and rejected proposals to alter Executive Order 11,246 and the prevailing judicial interpretations of Title VII as permitting, and in some circumstances requiring, race conscious action." *Regents of the University of California* v. *Bakke, supra*, 438 U.S. at 353 n.28 (opinion of Brennan, White, Marshall and Blackmun, JJ.).

Indeed, the only amendments affecting the provisions of section 706(g) which were adopted in 1972 were not limitary but expansive. Congress re-enacted the original section and added language providing that court-ordered affirmative action "is not limited to" reinstatement, hiring and award of back pay and language providing that a remedial order may include "any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g). See *Franks* v. *Bowman Transportation Co., Inc., supra*, 424 U.S. at 763-64.

A hard and fast rule prohibiting any remedy other than individual victim, rightful place remediation would be inconsistent with the policies and provisions of Title VII. It is true that Title VII protects individuals, not groups. *Connecticut* v. *Teal*, ___ U.S. ___, 102 S.Ct. 2525, 2534 (1982); see *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702, 708 (1978). However, the *Teal* and *Manhart* cases reflect only the rule that a remedy may not be denied to an individual who has proved discrimination against herself simply because there is, in aggregate, no statistically demonstrable discrimination against the group of which the individual is a member. In fact, Title VII is directed at discrimination against individuals because they are members of a group. *Oatis* v. *Crown Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968); Duncan, *supra*, 17 Harv. C.R.-C.L. L. Rev. at 5, 12; Note, *Last Hired, First Fired Seniority*, 11 Colum.J.L.&Soc.Probs. 343, 385 (1975). Because race discrimination is generally directed against all members of the race, proof of individual victimization may often be an impossible task and an unrealistic exercise. See, *e.g.*, *United States* v. *Louisiana*, *supra*, 225 F.Supp. at 397; *cf. International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 364, 368, 371. Particularly is this so where past discrimination has resulted in systematic exclusion from employment, since the victims include not only those who stepped forward to be victimized directly but also all those who, knowing the system, never sought to acquire a claim rather than a job. *Id.* at 367; *United States* v. *Sheet Metal Workers Int'l Ass'n Local U. 36*, *supra*, 416 F.2d at 132.

> The person who applied and was discriminatorily rejected may, however, be the unusual case, since the fact that an employer refused to hire minority workers may have dissuaded these workers from making futile applications. Persons who were dissuaded from applying by the employer's reputation are discriminated against just as much by the layoff as those who actually applied and were rejected.

Note, *Last Hired*, *supra*, 88 Harv. L. Rev. at 1557. Unlike denial of promotion, transfer or other enhancement of present position, systematic exclusion from employment operates against virtually any and all members of the minority group. There is no discrete set of possible victims, and, in practical terms, there is little prospect of individually proving victimization. If the courts are confined, by rigid rule, to individual victim relief alone, the right of equal employment opportunity will be theoretically enshrined, but the wrong will often go without real remedy.

Individual victim, rightful place remediation is one remedy under Title VII. However, the Court has never said that such relief is the only proper remedy under the act, and it should not do so now. Absent remedial measures extending beyond individual victim relief, systematic exclusion from employment will perpetuate itself, and the effects of past discrimination will go uncured. See U.S. Comm'n on Civ. Rts., *supra*, 9-13.

The United States also argues that the last sentence of section 706(g) bars non-victim relief here. (Brief for the United States as Amicus Curiae at pp. 22-24.)[10] That sentence provides:

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[10] This represents a dramatic change of position by the United States in these very proceedings. In 1974, the United States opposed a petition for certiorari seeking review of the original court of appeals decision, including its non-victim specific relief, in the fire case. The United States, an active plaintiff at the time, argued to the Court: "Given a finding of racial discrimi-

> No order of the court shall require the . . . . hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was . . . refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin in violation of section 2000e-3(a) of this title.

42 U.S.C. § 2000e-5(g). The United States, however, reads far more into this provision than was intended by Congress.

The last sentence of section 706(g), as originally drafted, prohibited a court from ordering affirmative equitable relief for anyone who was refused employment or advancement or who was suspended or discharged for "cause". See House Judiciary Committee report accompanying the submission of H.R. 7152, H.R.Rep. 914, 88th Cong., 1st Sess., reprinted in 1964 U.S. Code Cong. and Admin. News 2405; Vaas, *Title VII: Legislative History*, 7 B.C. Ind. Com. L. Rev. 431, 438 (1966). This language reflected a concern that the Act should not be applied so as to require an employer to hire, retain or promote an individual who was not qualified or to do so where there has been no employment discrimination. See, *e.g.*, 110 Cong. Rec. 8219, 14320.

Congressman Celler, who introduced the administration's omnibus civil rights bill, offered an amendment to clarify the meaning of the last sentence of § 706(g). The amendment struck the word "cause" and substituted the phrase "any

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nation in employment, affirmative hiring relief of some sort, with numerical objectives, is both appropriate and constitutional. As petitioners apparently acknowledge. . ., such relief has uniformly been sustained by the courts of appeals. Indeed, the failure of a district court to order such affirmative relief after a finding of racially discriminating employment practices has been held to be an abuse of discretion." *Commissioners and Director of Civil Service* v. *Boston Chapter, NAACP, Inc.*, No. 74-746, Brief for the United States in Opposition p. 14 (1974).

reason other than discrimination on account of race, color, religion or national origin." 110 Cong. Rec. 2567. In offering the amendment, Representative Celler stated:

> Mr. Chairman, the purpose of the amendment is to specify cause. Here the court, for example, cannot find any violation of the act which is based on facts other — and I emphasize 'other' — than discrimination on the grounds of race, color, religion or national origin. The discharge might be based, for example, on incompetence or a morals charge or theft, but the court can only consider charges based on race, color, religion, or national origin. That is the purpose of the amendment.

Id.

The only member of the House to address the substance of the amendment was Representative Gill, who supported it as an effort to "define more exactly the reasons for which a discharge can be contested under this act." *Id.* at 2568. Mr. Gill stated:

> I would just like to point out . . . by striking the word 'cause' and adding the words 'any reason other than discrimination on account of race, color, religion or national origin', our purpose is to pinch down the orders that can be issued by the court to a more narrow range. Thus, we would not interfere with discharges for ineptness, or drunkenness. We would not interfere with unfair labor practices that are covered under other acts. We would limit orders under this act to the purposes of this act.

Id. at 2570. The purpose of this provision was to ensure that federal courts act under Title VII only to remedy employment practices which are discriminatory. "The sentence merely

preserves the employer's defense that the non-hire, discharge, or non-promotion was for cause other than discrimination." *Equal Employment Opportunity Comm'n* v. *American Telephone and Telegraph Co.*, *supra*, 556 F.2d at 176; see Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 Colum. L. Rev. 292, 298-99 (1982) (Brodin). Indeed, it appears that in amending the language of the bill, congressional concern was to draw a line between the ambit of Title VII and that of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, as well as to define the types of employment practices which the federal courts could remedy. Thus Representative Gill stated:

> For instance, you may have many other situations, such as unfair labor practices under the Taft-Hartley law which would not be covered under this amendment. This amendment merely makes sure it will be covered under some other act rather than this one.

110 Cong. Rec. 2568.

Although section 706(g) was "expressly modeled," *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 419 & n.11, on analogous provisions of section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c), "[t]he principles developed under the [National Labor Relations Act] generally guide, but do not bind, courts tailoring remedies under Title VII." *Ford Motor Co.* v. *Equal Employment Opportunity Comm'n*, ____ U.S. ____, 102 S.Ct. 3057, 3062-63 n.8 (1982). "To the extent that there is a difference in the wording of the respective provisions, § 706(g) grants, if anything, broader discretionary powers than those granted the National Labor Relations Board." *Franks* v. *Bowman Transportation Co., Inc.*, *supra*, 424 U.S. at 769 n.29. Section 706(g) grants remedial powers to a district court, not to an administrative agency. See Brodin, *supra*, 82 Colum. L. Rev. at 297-98 n.26. The court,

in addition, is empowered to issue "other equitable relief" as well as those analogous remedies specified in the National Labor Relations Act. Section 706(g) provides for judicial relief in cases where discrimination has occurred; there is nothing in the legislative history of the last sentence of the section which indicates congressional intent to limit equitable remedies once unlawful discrimination has been found. See Lopatka, *Protection Under the National Labor Relations Act and Title VII of the Civil Rights Act for Employees who Protest Discrimination in Private Employment*, 50 N.Y.U. L. Rev. 1179, 1220-21 n.166 and 167 (1975).

Moreover, the last sentence of section 706(g) is not even relevant to the court orders now under review. The district court's August 7, 1981 orders did not direct the "hiring, reinstatement or promotion" of any individual. They prohibited the termination of minority employees below specified levels of representation. And they did this in a special context for a special purpose: to prevent the frustration of unfinished relief.

B. *The District Court's Orders Were Not Barred By Section 703(h) Of Title VII*

The provisions and policy of section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), do not prohibit the district court's August 7, 1981 orders. Plaintiffs did not challenge the lawfulness of the Massachusetts civil service seniority statute, and they did not seek to establish a violation of Title VII by reason of the City's layoff program. Rather, they sought to modify relief which was based upon a past adjudication of liability.

Section 703(h) is definitional, establishing a liability standard only. It therefore has no bearing upon the proper scope of remedies. Section 703(h) does not "qualify or proscribe relief otherwise appropriate under the remedial provisions of Title VII . . . in circumstances where an illegal discriminatory act or practice is found." *Franks* v. *Bowman Transportation Co.*,

Inc., *supra*, 424 U.S. at 758. See *id.* at 758-62; *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 346-47; *Equal Employment Opportunity Comm'n* v. *American Telephone and Telegraph Co.*, *supra*, 556 F.2d at 174.

The district court's orders had definite, but limited, impact upon operation of the civil service seniority system. (See *supra*, pp. 31-32). The orders required the seniority scheme to operate within two pools; otherwise, they superseded no provisions of the statute. The orders effected no across-the-board competitive seniority benefits. For that matter, the orders conferred no lasting benefit and have no lasting effect. Importantly, the orders incorporated the statutory requirement that upon reinstatement or rehiring original seniority ranking would be restored.

The district court's orders cannot be said to deprive Boston police officers and firefighters of indefeasibly vested rights. "This Court has long held that employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest." *Franks* v. *Bowman Transportation Co., Inc.*, *supra*, 424 U.S. at 778. The Court has also noted that those expectations may be disappointed by modification of collective bargaining agreements and that "the ability of the union and employer voluntarily to modify the seniority system to the end of ameliorating the effects of past racial discrimination, a national policy objective of the 'highest priority', is certainly no less than in other areas of public policy interests." *Id.* at 779.

The seniority interests of Boston police officers and firefighters are not contract rights, for seniority is governed entirely by Massachusetts civil service law. (Jt. App. 45, 81). Seniority arrangements do not represent here the achievement of organized labor or the fruit of collective bargaining. The district court's orders did not interfere with "the policy favoring minimal supervision . . . over the substantive terms of collective bargaining agreements." *American Tobacco Company* v. *Patterson*, ____ U.S. ____, 102 S.Ct. 1534, 1541 (1982).

In establishing the requirements, priorities and preferences which affect both job eligibility and order of layoff, the Massachusetts statute reflects a variety of public policies. According greater job security to those with longer service is only one. Civil service examination results and various priorities based upon veterans status and residence affect the date of original employment and thereby affect the length of tenure. See Mass. Gen. Laws c. 31, §§ 1, 6, 7, 26, 58.[11] Moreover, although separation from employment for lack of work or money or abolition of position is based upon length of service, disabled veterans enjoy an absolute preference. Mass. Gen. Laws c. 31 §§ 26, 39. Indeed, the disabled veterans preference here protected from layoff approximately 63 non-minority police officers and approximately 47 non-minority firefighters.[12] In the absence of this preference, layoffs in the Police Department would only have reached non-minorities with seniority dates of February 1974 and in the Fire Department of August 1977.

The statutory arrangement also drastically undercuts any reliance interest based upon length of service. Expectations

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[11] These priorities affect large numbers of civil service candidates and employees. *See generally, Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256 (1979). For example, preferences for disabled veterans benefit any individual receiving disability benefits from the United States Veterans Administration. Mass. Gen. Laws c. 31 § 1; c. 4 § 7. On the other hand, no veterans preferences of any sort were extended to Vietnam era veterans, a group including large numbers of racial minorities, until 1976. *Id.*

[12] These figures may be determined from seniority rosters and disabled veterans lists maintained by the Police and Fire Departments. The impact of the disabled veterans preference in the police case is referred to in the August 3, 1981 Supplemental Stipulation (Jt.App. 90), and the magnitude of its effect on the order of layoffs which otherwise would have occurred strictly by seniority may be ascertained by comparing the number of officers laid off with the number of officers hired in each department during the period between 1974 and 1980. (See Jt.App. 43, 79). Thus, the Police Department intended to lay off 252 officers; yet 250 new officers had been hired in 1979-80 alone. Similarly, the Fire Department intended to lay off 207 officers; yet over 275 officers had been hired in 1978-80 alone.

of public employees may be modified or defeated at any time by new legislation. Massachusetts law is well-settled on this score. "The Legislature has the power to create offices, establish their tenure, define the eligibility of those seeking such offices, fix their compensation or duties, change the tenure, compensation or duties, and abolish all of such offices. . . ." *Nichols* v. *Comm'r of Public Welfare*, 311 Mass. 125, 130, 40 N.E.2d 275, 279 (1942). *Accord McCarthy* v. *Sheriff of Suffolk County*, 366 Mass. 779, 784, 322 N.E.2d 758, 762 (1975); *Comm'r of Admin.* v. *Kelley*, 351 Mass. 686, 691, 223 N.E.2d 670, 674 (1967). The rule applies to civil service employees as well as to all others. See, *e.g.*, *Cullen* v. *Mayor of Newton*, 308 Mass. 578, 580, 32 N.E.2d 201, 203 (1941); *McNeil* v. *Mayor and City Council of Peabody*, 297 Mass. 499, 503-04, 9 N.E.2d 566, 568 (1937); *Director of Civil Defense* v. *Leger*, 9 Mass. App. Ct. 737, 404 N.E.2d 679, 681 (1980). Indeed, in recently addressing Boston's fiscal affairs, the Massachusetts legislature specially conferred permanent and paramount job security on those police officers and firefighters who had been laid off during the City's 1981 reduction in force program, thus superseding the civil service statute and abrogating the expectations of other personnel. (See *supra*, pp. 13-14.)

The district court's orders did not conflict with the basic policies served by seniority systems, including protection of the worker from employer favoritism, see, *e.g.*, Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1604-05 (1969) (Cooper & Sobol), and from replacement at an advancing age with younger, and cheaper, labor, see, *e.g.*, Poplin, *Fair Employment in a Depressed Economy*, 23 U.C.L.A. L. Rev. 177, 197 (1975). The superseding of seniority expectations here was the result of court order, not employer election. Possible injustice at the hands of the employer is irrelevant. The orders set objective criteria and, aside from pooling, based them upon the provisions of the existing statute. There has been no risk of caprice,

and there has been no charge that the orders disrupted Police or Fire Department management. Finally, although seniority gives employees some basis for predicting their future employment position, Cooper & Sobol, *supra*, 82 Harv. L. Rev. at 1604-05, in actuality the employee predictive interest is reduced to guesswork. The magnitude of any layoff program, the extent of intervening junior hires, the number of officers with preference status and the extent of department or rank transfers all have profound effect upon the individual employee's ability to predict, and derive security from, seniority status.

Seniority is an important feature of labor relations, but it is neither a practice nor a policy which ought to control these cases singlehandedly. Petitioners would have the principle of seniority override all other considerations. This is unwarranted. As a necessary means to prevent eradication of an ongoing remedy of race discrimination, the district court's orders served national policies of the "highest priority." *Newman* v. *Piggie Park Enterprises*, *supra*, 390 U.S. at 402. The compelling public interest in eradicating the effects of racial discrimination in public safety employment, the history of prior discrimination in these cases and the need to prevent frustration of an ongoing process of remediation called for careful weighing as well. The district court properly considered these factors and correctly found that the provisions of section 703(h) did not bar the exercise of its equitable power.

IV. The District Court's Orders Were Not Barred By The Tenth Amendment

The State Petitioners rely upon *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), to argue that each of the district court's orders is invalid under the Tenth Amendment because it

"regulates the 'States as States,' addresses 'matters that are indisputable attributes of state sovereignty,' and directly impairs the States' ability to structure integral operations in areas of traditional governmental functions." (See Brief for State Petitioners p. 77). The State Petitioners assert a limitation on federal judicial power; they do not merely challenge the propriety of the exercise of power concededly possessed. The State Petitioners claim, in effect, that the district court does not have the power, in a race discrimination case, to issue a remedial order affecting municipal employment arrangements established by state civil service law. The argument is not supported by *Usery* and is unsound.

These race discrimination cases were brought under the Fourteenth Amendment and statutes enforcing it. In *Usery*, by contrast, the Court dealt only with the limits set by the Tenth Amendment on congressional exercise of Commerce Clause powers. The Court explicitly refrained from expressing any view regarding the extent of congressional power "to affect integral operations of state government" under other sections of the Constitution, including in particular the Fourteenth Amendment. *Id.* at 852 n.17.

The Fourteenth Amendment sets limits on the power of the states. The Tenth Amendment, consequently, bars neither congressional enforcement nor judicial enforcement of the Fourteenth Amendment. Congressional power to regulate state action is vastly greater under the Fourteenth Amendment than under the Commerce Clause. "The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action. . . ." *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 454 (1976), quoting *Ex Parte Virginia*, 100 U.S. 339, 346 (1880). In *Bitzer*, the Court held that Title VII did not violate principles of state sovereignty preserved by the Eleventh Amendment. The Court said:

> the Eleventh Amendment, and the principle of state sovereignty which it embodies, . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. . . . When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority.

Id. at 456.

Similarly, the Court has rejected Tenth Amendment challenge to suits under 42 U.S.C. § 1983. "The Tenth Amendment's reservation of nondelegated Powers to the States is not implicated by a federal court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment." *Monell* v. *New York City Dept. of Soc. Serv.*, 436 U.S. 658, 690 n.54 (1978), quoting *Milliken* v. *Bradley, supra*, 433 U.S. at 291, and citing *Ex Parte Virginia, supra*, 100 U.S. at 347-48. And it has been held that the Tenth Amendment does not bar application of Title VII to states and their subdivisions. *Norris* v. *Arizona Governing Committee for Tax Deferred Annuity*, 671 F.2d 330, 336 (9th Cir. 1982), *cert. granted*, ____ U.S. ____, 103 S.Ct. 205 (1982); *Love* v. *Waukesha Joint School District #1, Bd. of Ed.*, 560 F.2d 285, 287 (7th Cir. 1977).

The State Petitioner's Tenth Amendment argument relies critically upon the fact that the district court's orders affected areas of traditional government function and state sovereignty. The argument, consequently, denies the power of the federal judiciary to enforce the civil rights laws and the Constitution in all areas of state employment, and of public education as well. The logic of the argument belies its merit.

Suggestion of Mootness

The controversy once presented in this case has become moot as a result of enactment of 1982 Mass. Acts c. 190, providing for reinstatement of all officers terminated pursuant to the City's 1981 reduction in force program, and as a result of the City's recent resumption of hiring of new officers. (See Petition for Writ of Certiorari of Boston Firefighters Union, Local 718 p. 8.) Absent actual controversy, the Court has no jurisdiction, *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971), and the petitions should be dismissed as improvidently granted.

The Court has ruled that:

> "a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome" . . . jurisdiction, properly acquired, may abate if the case becomes moot because
>
> (1) it can be said with assurance that 'there is no reasonable expectation . . .' that the alleged violation will recur, and
>
> (2) . . . events have completely and irrevocably eradicated the effects of the alleged violation . . . .
>
> When both conditions are satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law.

County of Los Angeles v. *Davis*, 440 U.S. 625, 631 (1979). The standards are met here. Because all officers laid off in 1981 have been rehired, there is no live case or controversy with respect to the district court's August 7, 1981 orders. Because the recent statute guarantees all reinstated officers security against future layoff, there is no possibility that the controversy could be repeated between the same parties. And because

the Police and Fire Departments are under obligations to maintain minimum staffing levels and have resumed hiring, there is no reasonable likelihood that future layoffs will occur.

The Unions and the United States as amicus curiae, however, assign three reasons why the controversy is not moot. Each is misconceived. First, one Union petitioner and the United States argue that the controversy remains alive because of pending claims for back pay brought before the Massachusetts Civil Service Commission by officers who were laid off during the City's layoff program and assert that they would not have been laid off had the reductions in force proceeded strictly in accordance with seniority. (Firefighters Petition pp. 17-18; Brief for United States p. 9.) Yet, the issue for decision in the civil service proceedings is not the issue for decision here; the decision here will not dispose of the claim raised there; and the decision here will not relieve the injury that assertedly remains unremedied.

The only issue for decision in the civil service proceedings is whether the action of the City in terminating any officer "was justified." Mass. Gen. Laws c. 31 § 42. See *Cambridge Housing Authority* v. *Civil Service Comm'n*, 7 Mass. App. Ct. 586, 588, 389 N.E.2d 432, 433-34 (1979). This is a matter exclusively of state law, and neither the Court nor the lower federal court has been asked to pass on the question.

Because the Court cannot adjudicate the back pay claim, it cannot grant relief on the claim which is said to keep the controversy alive. When, due to changed circumstances, a court cannot grant such relief in proceedings then pending before it, the case has become moot. *Alejandrino* v. *Quezon*, 271 U.S. 528, 533-35 (1926). Compare *Powell* v. *McCormack*, 395 U.S. 486, 497-99 (1969); *Bond* v. *Floyd*, 385 U.S. 116, 128 n.17 (1966). The basic rationale of mootness doctrine compels this result. Mootness is "the doctrine of standing set in a time frame: the requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363,

1384 (1973), quoted with approval in *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 397 (1980). This personal interest exists only when the claimed injury can be redressed by a favorable decision of the court before which the claim is pending. See *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976); *Warth* v. *Seldin*, 422 U.S. 490, 498-99 (1975). That a decision may be dispositive of an issue raised in proceedings pending in another tribunal does not save any case before a court from being moot. See *California* v. *San Pablo and Tulare R.R. Co.*, 149 U.S. 308, 314 (1893).

Moreover, there is no credible basis for assuming that a decision of the Court, even a reversal, would have dispositive effect upon any back pay claim. The Boston layoffs were accomplished pursuant to an outstanding federal court order. As such, they were justified at the time they were implemented. This justification cannot be lost by any subsequent reversal of the order. A court order validly entered, when the court has both subject matter and personal jurisdiction, gives rise to a plain legal duty to obey until it is stayed, vacated or reversed. This is true under federal law, *Maness* v. *Meyers*, 419 U.S. 449, 458-59 (1975); *United States* v. *United Mine Workers of America*, 330 U.S. 258, 293 (1947), and under Massachusetts law, *Town of Stow* v. *Marinelli*, 352 Mass. 738, 743-44, 227 N.E.2d 708, 713 (1967).

Second, the Unions and the United States suggest that layoffs out of seniority order "may defer" officers' eligibility to sit for promotional examinations. (Firefighters Petition p. 8; Brief for Boston Police Patrolmen's Ass'n p. 7 n.1; Brief for United States p. 9 n.8.) This is plainly not the case. Although eligibility to sit for promotional examinations is subject to length of service, Mass. Gen. Laws. c. 31, § 59, an employee whose service is terminated due to reduction in force and who is thereafter reinstated loses no time for purposes of promotional eligibility. Mass. Gen. Laws c. 31, § 33 expressly provides that, in making any computation of length of service, "the continuity of service of such employee shall be deemed

not to have been interrupted if such absence was the result of . . . abolition of position or layoff because of lack of work or money. . . ." Consequently, the layoff of any now-reinstated officer could affect promotional eligibility only if a promotional examination had been administered during the period of layoff. This was not the case, however, and no party has claimed that it was.

Third, the Unions and the United States assert that the district court's orders have permanent effect and that therefore the case is not moot under the teaching of *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115 (1974). (Briefs and Petitions, *supra*.) The argument, however, mischaracterizes the orders below. The decrees were addressed solely to the City's 1981 layoffs, events long passed. The decrees express no permanence of prohibition; plaintiffs sought none; the situation called for none; and the ongoing remedial programs, of which the modification orders were a part, presuppose none.

The controversy asserted here cannot be characterized as "capable of repetition yet evading review." *Super Tire Engineering Co.* v. *McCorkle*, *supra*, 416 U.S. at 122. *Super Tire* addressed a claim regarding "policy [which] is fixed and definite. It is not contingent upon executive discretion." *Id.* at 124. Neither the City's layoff program nor the district court's order was fixed or permanent. The layoff program is over. Given the permanent job security and prohibition of reduction in staffing through fiscal 1983 which are mandated by 1982 Mass. Acts, c. 190, there is no "reasonable expectation" or "demonstrated probability", *Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982), that the circumstances giving rise to plaintiffs' motions for modified relief will occur again. Indeed, the statute precludes the possibility that a controversy will occur involving the same officers on whose behalf the present proceedings were brought. See *id.* Moreover, any future order of the district court would depend upon future circumstances. Its issuance is not certain; indeed, both its issuance and its terms would be discretionary. Nothing is now fixed, and nothing in the future would evade review.

Conclusion

The petitions should be dismissed as improvidently granted. If the Court reaches the merits, the judgment of the court of appeals should be affirmed.

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APPENDIX A

MASSACHUSETTS ACTS OF 1982
Chapter 190

AN ACT Establishing the City of Boston Funding Loan Act of Nineteen Hundred and Eighty-Two And The Massachusetts Convention Center Authority.

SECTION 25. Notwithstanding the provisions of any general or special law to the contrary, the appointing authority of the police department and the fire department of the City of Boston shall reinstate to active service as of the effective date of this act any uniformed officer of either department who was in service or on injured leave as of July first, nineteen hundred and eighty-one, or was temporarily suspended as of July first, nineteen hundred and eighty one, which suspension has expired, except for disciplinary reasons consistent with chapter thirty-one of the General Laws or in pursuit of an involuntary retirement under section seven of chapter thirty-two of the General Laws and shall not thereafter terminate any such officer or take any other personnel action the effect of which would be to separate such officer from active service in the future for lack of funds. During the fiscal years ending June thirtieth, nineteen hundred and eighty-two and June thirtieth, nineteen hundred and eighty-three the city of Boston shall maintain in the police department and the fire department of the City of Boston, either in active service, training or recruitment, no fewer uniformed employees than the total of the number in service or on injured leave on March twenty-fourth, nineteen hundred and eighty-two plus the number of uniformed employees eligible for reinstatement pursuant to this section, without regard to the number of eligible uniformed employees who actually return to service in either department. Nothing herein shall prevent an employee of either department from being placed in injured leave under

the provisions of section one hundred and eleven F of chapter forty-one of the General Laws. The mayor shall annually request and the city council shall annually appropriate sufficient amounts to the respective departments to cover the costs imposed by this section, but nothing in this section shall be construed to permit the officers in charge of said departments to expend funds in excess of available appropriations in violation of the city charter.

APPENDIX B

Statistical Comparison of Black and/or Hispanic Representation in Police Forces and in Relevant Populations

Made By Federal Courts in Employment Discrimination Cases During the 1970's

Political Subdivision	Minority Percentage In Police Force	Minority Percentage In Population
1. Akron, OH	3%	17.5%
2. Alabama	0%	N/A
3. Albuquerque, NM	21.4%	39.2%
4. Baltimore, MD	14.39%	47%
5. Baton Rouge 39 Municipalities 9 Parishes in LA	8.2%	27.3%
6. Boston, MA	2.3%	16.3%
7. Buffalo, NY	2.72%	23.7%
8. Chicago, IL	17%	40%
9. Cleveland, OH	8.1%	38%
10. Detroit, MI	17%	50%
11. East Cleveland, OH	12%	60%
12. East Providence, RI	.8%	3.5%
13. Erie, PA	1.4%	6.8%
14. Illinois State Highway Police	1.7%	14.7%
15. Mississippi Highway Patrol	.7%	36.7%
16. Mobile, AL	12%	
17. North Chicago, IL	.08%	50%
18. Oakland, CA	3-4%	32-45%

Political Subdivision	Minority Percentage In Police Force	Minority Percentage In Population
19. Penn Hills Township, PA	0%	4.5%
20. Philadelphia, PA	18%	34.7%
21. Pittsburgh, PA	5.9%	20%
22. St. Petersburg, FL	7.5%	14.75%
23. Santa Ana, CA	9.2%	25.8%
24. Toledo, OH	8.4%	16%

Source of Data

1. *Arnold v. Ballard*, 390 F.Supp. 723, 726 (N.D.Ohio 1975)
2. *NAACP v. Allen*, 340 F.Supp. 703, 705 (M.D.Ala. 1972), *aff'd and remanded*, 493 F.2d 614 (5th Cir. 1974)
3. *Chicano Police Officers' Ass'n v. Stover*, 526 F.2d 431, 439 n.10 (10th cir. 1975), *vacated and remanded*, 426 U.S. 944 (1976), *on remand*, 552 F.2d 918 (10th Cir. 1977)
4. *Vanguard Justice Society, Inc. v. Hughes*, 471 F.Supp. 670, 724 (D.Md. 1979)
5. *United States v. City of Alexandria*, 614 F.2d 1358, 1360 (5th Cir. 1980)
6. *Castro v. Beecher*, 334 F. Supp. 930, 935 (D.Mass. 1971), *aff'd in part, rev'd in part*, 459 F.2d 725, 728 n.1 (1st Cir. 1972), *on remand*, 365 F.Supp. 655 (D.Mass. 1973)
7. *United States v. City of Buffalo*, 457 F.Supp. 612, 621 (W.D.N.Y. 1978), *aff'd*, 633 F.2d 643 (2d Cir. 1980)
8. *United States v. City of Chicago*, 385 F.Supp. 543, 548 (N.D.Ill. 1974), 411 F.Supp. 218 (N.D.Ill. 1976), *aff'd in part and rev'd in part*, 549 F.2d 415 (7th Cir. 1977)
9. *Shield Club v. City of Cleveland*, 370 F.Supp. 251, 255 (N.D.Ohio 1972)
10. *Detroit Police Officers Ass'n v. Young*, 608 F.2d 671, 681 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981)
11. *Smith v. City of East Cleveland*, 363 F.Supp. 1131, 1134 (N.D.Ohio 1973), *aff'd in part, rev'd in part*, 520 F.2d 492 (6th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976)
12. *Pina v. City of East Providence*, 492 F.Supp. 1240, 1242 (D.R.I. 1980)
13. *Erie Human Relations Comm'n v. Tullio*, 357 F.Supp. 422, 425 (W.D.Pa. 1973), *aff'd*, 493 F.2d 371 (3rd Cir. 1974)

14. *Washington v. Walker*, 529 F.2d 1062, 1063 (7th Cir. 1976)
15. *Morrow v. Dillard*, 412 F. Supp. 494, 498 (S.D. Miss. 1976), *aff'd in part, rev'd in part*, 580 F.2d 1284 (5th Cir. 1978)
16. *Allen v. City of Mobile*, 331 F. Supp. 1134, 1137 (S.D. Ala. 1971), *aff'd*, 466 F.2d 122 (5th Cir 1972), *cert. denied*, 412 U.S. 909 (1973)
17. *Bridges v. City of North Chicago*, 402 F.Supp. 418, 420 (N.D.Ill. 1975)
18. *Penn v. Stumpf*, 308 F.Supp. 1238, 1243 n.7 (N.D.Cal. 1970)
19. *Commonwealth of Pennsylvania v. Sebastian*, 368 F.Supp. 854, 855 (W.D.Pa. 1972), *aff'd*, 480 F.2d 917 (3rd Cir. 1973)
20 *Commonwealth of Pennsylvania v. O'Neil*, 348 F.Supp. 1084, 1087 (E.D. Pa. 1972), *aff'd in part, modified in part*, 473 F.2d 1029 (3rd Cir. 1973)
21. *Commonwealth of Pennsylvania v. Flaherty*, 404 F.Supp. 1022, 1024 (W.D.Pa. 1975)
22. *Drayton v. City of St. Petersburg*, 477 F.Supp. 846, 850 (M.D. Fla. 1979)
23. *League of United Latin American Citizens v. City of Santa Ana*, 410 F. Supp. 873, 880 (C.D.Cal. 1970)
24. *Sarabia v. Toledo Police Patrolman's Ass'n*, 601 F.2d 914, 917 (6th Cir. 1979)

APPENDIX C

Statistical Comparison of Black and/or Hispanic Representation in Fire Departments and in Relevant Populations Made by Federal Courts in Employment Discrimination Cases During the 1970's

Political Subdivision	Minority Percentage In Fire Department	Minority Percentage In Population
1. Baton Rouge, LA	2%	27%
2. Baltimore, MD	13.7%	47%
3. Boston, MA	.9%	23%
4. Bridgeport, CT	.2%	41%
5. Buffalo, NY	1.2%	24.3%
6. Columbus, OH	2.31%	18.5%
7. Detroit, MI	7.5%	50%
8. Jacksonville, FL	12%	———
9. Los Angeles, CA	3.3%	29.1%
10. Memphis, TN	10%	33-37%
11. Minneapolis, MN	.3%	6.44%
12. New York, NY	5.6%	32%
13. Pittsburgh, PA	3.9%	20%
14. San Francisco, CA	.2%	43%
15. St. Louis, MO	11%	40%
16. St. Paul, MN	1.3-2%	8%
17. St. Petersburg, FL	3.9%	14.75%
18. Santa Ana, CA	4.5%	25.8%
19. Toledo, OH	1.8%	16%
20. Westchester County, NY		
New Rochelle	3.9%	16.1%
Mt. Vernon	3.1%	36%
White Plains	3.4%	15.4%

Source of Data

1. *United States v. City of Alexandria*, 614 F.2d 1358, 1360 (5th Cir. 1980)
2. *Harper v. Mayor and City Council of Baltimore*, 359 F.Supp. 1187, 1193 (D.Md.), *aff'd in part and modified in part sub nom. Harper v. Kloster*, 486 F.2d 1134 (4th Cir. 1973)
3. *Boston Chapter NAACP, Inc. v. Beecher*, 371 F.Supp. 507, 514 (D. Mass.), *aff'd*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975)
4. *Ass'n Against Discrimination v. City of Bridgeport*, 647 F.2d 256, 265 (2d Cir. 1981), *cert. denied*, ____ U.S. ____, 102 S. Ct. 1611 (1982)
5. *United States v. City of Buffalo*, 457 F. Supp. 612, 621 (W.D.N.Y. 1978), *aff'd*, 633 F.2d 643 (2d Cir. 1980)
6. *Dozier v. Chupka*, 395 F.Supp. 836, 840 (S.D. Ohio 1975)
7. *Van Aken v. Young*, 541 F.Supp. 448, 460 (E.D. Mich. 1982)
8. *Corley v. City of Jacksonville*, 506 F.Supp. 528, 530 (M.D. Fla. 1981)
9. *Davis v. County of Los Angeles*, 566 F.2d 1334, 1337 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979)
10. *Stotts v. Memphis Fire Department*, 679 F.2d 541, 550 (6th Cir. 1982), *petition for cert. pending.*
11. *Carter v. Gallagher*, 452 F.2d 315, 323, *modified on rehearing en banc* 452 F.2d 327, 328 (8th Cir.), *cert. denied*, 406 U.S. 950 (1972)
12. *Vulcan Society of the New York City Fire Department, Inc. v. Civil Service Comm'n of the City of New York*, 490 F.2d 387, 398 (2d Cir. 1973)
13. *Commonwealth of Pennsylvania v. Glickman*, 370 F.Supp. 724, 729 (W.D. Pa. 1974)
14. *Western Addition Community Organization v. Alioto*, 369 F.Supp. 77, 79 (N.D. Cal. 1973), *appeal dismissed*

as moot, 514 F.2d 542 (9th Cir. 1975), *cert. denied*, 423 U.S. 1014 (1975)

15. *Firefighters Institute for Racial Equality v. City of St. Louis, Missouri*, 616 F. 2d 350, 363 (8th Cir. 1980), *cert. denied*, 452 U.S. 938 (1981)
16. *Fowler v. Schwarzwalder*, 351 F.Supp. 721, 723 (D. Minn. 1972)
17. *Drayton v. City of St. Petersburg*, 477 F.Supp. 846, 850 (M.D. Fla. 1979)
18. *League of United Latin American Citizens v. City of Santa Ana*, 410 F. Supp. 873, 879 (C.D.Cal. 1976)
19. *Brown v. Neeb*, 644 F.2d 551, 555 (6th Cir. 1981)
20. *Vulcan Society of Westchester County, Inc. v. Fire Department of White Plains*, 505 F. Supp. 955, 958 (S.D.N.Y. 1981)